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ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

WESTERN DIVISION,
APRIL TERM, 1916

EASTERN DIVISION,
SEPTEMBER TERM, 1915.

MIDDLE DIVISION,
DECEMBER TERM, 1915.

◦ FRANK M. THOMPSON,
ATTORNEY-GENERAL AND REPORTER.

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135 Tenn.]

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1916.

(Continued from Volume 134.)

SOPHIE MAYDWELL *v.* W. H. MAYDWELL *et al.*

(Jackson. April Term, 1916.)

1. TRUSTS. Removal of Trustee. Friction with beneficiary.

Where testator's will directed his widow as trustee to apply the income from a daughter's share of the estate to the best interest of the latter and for her comfort, maintenance, and support, and friction developed between mother and daughter resulting in litigation and bad feeling, the mother will be removed as trustee on the daughter's application, irrespective of the merits of the dispute. (*Post*, pp. 3, 4.)

2. TRUSTS. Removal of trustee. Statute.

The chancery court has jurisdiction, under Shannon's Code, sections 5414, 5422, to remove a trustee for the causes enumerated in the statute and "for other good cause" at suit of the beneficiary. (*Post*, p. 4.)

Code cited and construed: Secs. 5414, 5422 (S.)

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3. TRUSTS. Removal of trustee. Equitable jurisdiction.

A court of equity has inherent jurisdiction to remove a trustee, independent of statutory provisions, for good cause shown. (*Post*, pp. 4, 5.)

Case cited and distinguished: *May v. May*, 167 U. S., 310.

FROM SHELBY

Appeal from the Chancery Court of Shelby County.
—FRANCIS FENTRESS, Chancellor.

L. T. M. CANADA, for appellants.

JACKSON & McREE, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

James Maydwell died in Memphis in 1892, the owner of a considerable estate. Two-ninths of this estate was devised in trust to his wife, Mrs. Sophie Maydwell, for the benefit of testator's daughter, Lizzie Maydwell, now Mrs. Lizzie Hunter. Mrs. Maydwell has acted as trustee for her daughter since the death of her husband. In this case Mrs. Hunter is seeking to have her mother removed as such trustee.

The proof shows that Mrs. Maydwell is a woman of excellent business judgment. She has managed the estate well, preserving it and improving it. Likewise, Mrs. Maydwell is a woman of integrity and intelligence.

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The proof further shows, however, that the relations existing between Mrs. Maydwell and her daughter are quite unfriendly and have been so for several years past. They have become involved in litigation three times about the management of the trust estate. This mutual animosity appears to be deep-seated and permanent.

The chancellor was of opinion that Mrs. Maydwell was a suitable person to manage this trust and declined to remove her. Under the circumstances of this case we think his honor was in error. We think Mrs. Maydwell should be removed.

We say this without any reflection upon the honesty or acumen of Mrs. Maydwell. It is beyond doubt that she has managed this estate well. She has been diligent in collecting its revenues and by judicious improvements has greatly enhanced its value. We think she is still capable of preserving the estate and managing it wisely notwithstanding her age.

Nevertheless the proof shows that the relations between Mrs. Maydwell and her daughter, Mrs. Hunter, are such that it would be inadvisable and prejudicial to the best interests of both and of the estate for Mrs. Maydwell to be continued as trustee.

We do not undertake to fix the blame for the state of feeling between the mother and daughter, nor do we regard the responsibility for this condition to be a matter of special importance in disposing of the question before us. Under the terms of James Maydwell's will the trustee for his daughter is directed to apply the income from the daughter's share of the

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estate to the best interests of the latter and for her comfort, maintenance, and support.

To properly discharge such duties the trustee should be on friendly terms with the beneficiary. The trustee should have the confidence of the beneficiary so as to know the needs of the latter—to appreciate what expenditures should be made for the comfort, maintenance, and support of the latter. Moreover, the trustee should be favorably disposed to the beneficiary so that the discretion of the trustee may be employed for the best interests of the beneficiary. Such a personal trust cannot be satisfactorily administered where the relations between the parties are hostile. Unless a new trustee is appointed, the antagonism between mother and daughter will result in wasting the estate in litigation, if we are to judge by the conduct of these parties in the past.

The chancery court has jurisdiction under the statutes of this State (Shannon's Code, sections 5414, 5422) to remove a trustee for the several causes enumerated in the statute, and "for other good cause," at the suit of the beneficiary.

A court of equity also has inherent jurisdiction to remove a trustee independent of statutory provisions for good cause shown. 39 Cyc., 265.

Under the great weight of authority a court of equity may remove a trustee where the relations between him and the *cestui que trust* are inharmonious and unfriendly. When the duties of the trustee are such as to necessitate personal contact and conference between

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the trustee and the *cestui que trust*, and the relations existing between the parties have become so acrimonious as to render personal intercourse impossible, a change of trustees should be made. 39 Cyc., 263, and cases collected under note 72.

Speaking on this subject, the supreme court of the United States has said:

"The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees . . . in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated." *May v. May*, 167 U. S., 310, 17 Sup. Ct., 824, 42 L. Ed., 179.

So, for the reasons stated, we think Mrs. Maydwell should be removed as trustee. The case will be remanded, and proper orders made by the chancellor to effect this removal, and the trust turned over to a suitable person selected by the chancellor under proper orders safeguarding the estate.

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B. R. ALLEN v. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

(*Jackson*. April Term, 1916.)

CARRIERS. Carriage of passengers. Passenger without ticket. Ejection.

Though a carrier can require a passenger to purchase a ticket before entering the train where it gives reasonable opportunity to do so and may enforce the rule by refusing to permit any one to enter a passenger train without a ticket, one who has in good faith openly entered a passenger car in the usual manner, and who offers to pay his fare, cannot be ejected because he has no ticket.

Cases cited and approved: Railroad Co. v. Garrett, 76 Tenn., 433;

McCook v. Northup, 65 Ark., 225; Railway v. Hammett, 98 Ark., 418; Ford v. E. Louisiana R. Co., 110 La., 414; Lane v. Railroad, 73 Tenn., 124.

Cases cited and distinguished: St. Louis, etc., R. Co. v. Kilpatrick, 67 Ark., 47; St. Louis, etc., R. Co. v. Blythe, 94 Ark., 153.

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—BEN L. CAPELL, Judge.

W. B. HARRIS, for plaintiff.

WRIGHT, MILES, WARING & WALKER, for defendant.

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MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Allen, who is a traveling salesman, brought this suit against the railway company to recover damages for his wrongful ejection from a passenger train by the conductor.

The trial judge in effect gave peremptory instructions in favor of the company to the jury on points vital to plaintiff's right of recovery; the jury accordingly rendered a verdict for the railway company, and the rulings were sustained by the court of civil appeals.

Allen was at Widener, Ark., in the pursuit of his business as a traveling salesman; and he desired to leave that place for Round Point, another station on the defendant company's line of railway about five miles distant, on a train that passed Widener about ten-thirty a. m. The train was about ten minutes late; and Allen was at the store of a merchant about seventy-five feet from the station when the train whistled for the station. He went at once to the depot, reaching there just before the train pulled up, but found that the agent who sold tickets was out of his office and on the platform attending to the loading and unloading of baggage and express matter. The village had a population of about two hundred, and the duties of attending to ticket sales and the handling of baggage and express devolved on the station agent.

Allen approached the agent, then at the express car of the train, and told the agent that he desired to purchase a ticket. The agent replied that he would sell

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him one so soon as the handling of the express matter was finished; and, after finishing, he went to the office and procured a ticket, but before he could get out to deliver it to Allen the train started off. Allen boarded it, went into the coach assigned to the colored passengers, and through it to the one occupied by white passengers. There he met the conductor, and was asked for his ticket. Allen responded that he had none, but that he had the cash with which to pay the fare, which he proposed to do. The conductor declined to receive the cash and told Allen that the latter could not ride without a ticket. He then stopped the train, and let Allen off the car in the presence of numerous passengers; Allen protesting against the treatment.

Allen, it is found, had an abundance of time to purchase a ticket before the train reached Widener; but he did not have time to do so after he reached the depot because the agent was thus engaged with outside duties.

Allen, in order to reach Round Point, walked the distance at about noon in August.

The railway company had a rule, posted at the depot, requiring passengers to purchase tickets before entering trains. The case was made to turn in the court of civil appeals on the violation by Allen of this rule.

Appellee company contends that Allen's expulsion from the train was thereby justified, and it relies on the following language from 2 Hutchinson on Carriers (3d Ed.), section 1032:

"It is undoubtedly competent for a railroad company as a means of protection against imposition and

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to facilitate the transaction of its business to require passengers to procure tickets before entering the car, and where this requirement is duly made known, and reasonable opportunities are afforded for complying with it, it may be enforced, either by expulsion from the train, regardless of the tender of the fare in money, or as will be seen in the following section, by requiring the payment of a larger fare upon the train than that for which the ticket might have been procured."

The doctrine thus broadly laid down by the editor of the later edition is not supported by the weight of authority. Indeed, it seems that, in the first edition of this leading work on the law of carriers, a different opinion was expressed by the author, as follows:

"If, however, in disregard or ignorance of such regulation (that passengers shall procure tickets as a condition of the right to enter the cars) one who desired to be carried without any fraudulent intent to impose upon the carrier, should obtain entrance into a car, he could not be treated as a trespasser, and would be entitled to the rights of a passenger; and, not being there with any dishonest or unlawful purpose, if ready and willing to pay the price of his carriage when demanded, he could not be ejected for his previous non-compliance with the regulation, but might demand his carriage to his intended destination upon an offer to pay according to the carrier's rates. However reasonable such a condition might be as a regulation for the convenience of the carrier, a failure to comply with it before the inception of the journey could not be con-

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sidered as a reasonable ground for ejecting the passenger after it had commenced."

The language thus used by Mr. Hutchinson, who was a Tennessee lawyer, was approved by this court in *Railroad Co. v. Garrett*, 8 Lea (76 Tenn.), 438, 41 Am. Rep., 640.

Later adjudications support this rule, in respect of those who have entered a passenger train; and the decisions of the supreme court of Arkansas appear to be peculiarly pertinent on the point, and announce what we conceive to be the sounder rules governing in the situation.

St. Louis, etc., R. Co. v. Kilpatrick, 67 Ark, 47, 54 S. W., 971, involved the expulsion of such a nonticket holder from a passenger train after it had been put in motion, he being able and ready to pay cash fare on demand. The company had a placarded rule: "Trainmen must examine tickets before allowing passengers to enter cars." The court said that:

One "who enters over the steps of a passageway to a car where passengers ride, and through an entrance, unobstructed, which passengers may freely use—we say, one who embarks upon a passenger train under such circumstances is a passenger, although he may not have . . . entered at a place where a porter or brakeman was stationed to inspect tickets."

See, also, *McCook v. Northup*, 65 Ark., 225, 45 S. W., 547.

The above decision was noted for distinction in *St. Louis, etc., R. Co. v. Blythe*, 94 Ark., 153, 126 S. W.,

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386, 29 L. R. A. (N. S.), 299, and followed in *Railway v. Hammett*, 98 Ark., 418, 136 S. W., 191.

In *Ford v. East Louisiana R. Co.*, 110 La., 414, 34 South., 585, it was held, after one enters the train, the fact that he has no ticket furnishes no excuse for putting him off, and that the demand upon him must be either for a ticket, or for the payment of the cash fare, and, if he offers to pay, the railway company ejects him at its peril.

These holdings are not in disregard of another sound principle: That a railway company has the right by rule, duly published, to require those offering for passage to purchase tickets and exhibit them before entering the cars of the company. One offering to enter without such a ticket may be turned back.

Such a rule is without doubt a reasonable one, but it is also one that must be reasonably administered. It is with the administration of the rule that the above cases deal, and the gist of them is that, as applied to passenger trains, it is unreasonable to eject from a moving train one who in good faith and without stealth or trick has passed into a car and is then willing, able, and offering to pay the demandable cash fare. The place to turn him back is at the car steps or entrance, and if, by reason of the company's failure to have its employee at such place to supervise the traffic, the offerer thus enters one of the cars, it is not reasonable that he should be ejected, at least after the train starts. 4 R. C. L., p. 1108.

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A different rule in this particular situation has been enforced in cases involving offerers for passage on freight trains, in this State (*Lane v. East Tenn., etc., R. Co.*, 5 Lea [73 Tenn.], 124); and elsewhere. See cases collected by the annotator of *St. Louis, etc., v. Blythe*, 29 L. R. A. (N. S.), 300, where it is said:

“So, the cases having to do with the carriage of passengers upon freight trains go further than those dealing with passenger trains, and hold that, if a person gets on a freight train without the required token, he may be expelled although he is willing to pay a cash fare.”

The distinction is not fanciful or without substance. The acceptance of passengers on freight trains is a matter of choice on the part of the railway company; not so as to passenger trains. Those offering themselves for passage on freight trains are not so numerous, and usually they are so few as not to justify the company in keeping employees at hand to so watch the inflow of passengers.

So far as the court of civil appeals justified the charge of the trial judge in announcing a contrary rule to that approved above, there was error. Writ of *certiorari* granted, and the judgment modified accordingly; the cause being remanded for a new trial in the circuit court.

Pemisnot County Bank v. Nat. Bank.

PEMISCOT COUNTY BANK v. CENTRAL STATE NAT. BANK
et al. (No. 21.)

(Jackson. April Term, 1916.)

1. BANKS AND BANKING. Cashier. Duties of. "Partnership."

Where a bank cashier who was also a member of a firm issued a draft to pay a firm obligation embezzling the bank's funds in his capacity as cashier, the bank cannot recover from the payees the amount of the draft on the theory that the cashier was merely paying his own obligation; for the commercial idea is that a partnership is practically an entity separate from the members composing it; this being particularly true as the name of the partnership indicated it was a corporation (citing Words and Phrases, Partnership). (*Post*, pp. 15-17.)

Cases cited and approved: *Holmes v. Sarrett*, 54 Tenn., 506; *Lacey v. Cowan*, 162 Ala., 546; *House v. Thompson*, 40 Tenn., 512.

Case cited and distinguished: *Menagh v. Whitwell*, 52 N. Y., 146.

2. CORPORATIONS. Names. Presumptions.

The name "Tindle Cotton Company" is *prima facie* that of a corporation, and not a partnership, and will be so treated by way of presumption in the absence of proof. (*Post*, pp. 17, 18.)

Case cited and approved: *Ingle System Co. v. Norris*, 132 Tenn., 472.

FROM SHELBY

Appeal from the Chancery Court of Shelby County.—F. H. HEISKELL, Chancellor.

Pemiscot County Bank v. Nat. Bank.

BOYD & BEJACH, for appellant.

JOHN D. MARTIN, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is a branch of a case that was before this court at the last term, in which an opinion was delivered under the same name style. 132 Tenn., 152, 177 S. W., 74.

The present appeal involves an alleged demand of the Pemiscot County Bank of Caruthersville, Mo., against Flippin & Jones, a copartnership engaged in business at Memphis. This firm had transactions with Tindle Cotton Company, a firm whose place of business was at Caruthersville, Mo. The last-named firm was composed of Tindle, Roberts and Johnson. To collect an indebtedness due from the Missouri to the Memphis firm, the latter drew a draft for \$1059.75 on Tindle Cotton Company, and deposited same in the Central State Bank at Memphis for the purpose of having it forwarded to Caruthersville for realization. The Memphis bank sent the draft to complainant bank, and upon its arrival A. C. Tindle, who was cashier of the complainant bank and a member of the Tindle Cotton Company, acting in his capacity of cashier, issued and mailed to the Memphis bank exchange covering the above and another collection item of \$4000, making an aggregate of \$5059.75, as follows:

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“Pemiscot County Bank,

“No 65226.

“Caruthersville, Missouri, Nov. 16, 1912.

“Pay to the order of Central State Bank five thousand and fifty-nine and 75/100 dollars (\$5059.75).

A. C. TINDLE, Cashier.

“To National Bank of Commerce, St. Louis, Mo.”

The proceeds realized from the St. Louis bank were credited by the Memphis bank to Flippin & Jones and checked out by them in due course of business.

The Tindle Cotton Company paid no consideration to complainant bank for the draft, and its issuance was, as was later developed, in fact, an act of embezzlement on the part of its cashier. However, the Memphis firm did not know whether the Tindle Cotton Company was a corporation or a partnership, and had no knowledge that Roberts and Johnson were partners of Tindle. They were personally acquainted with A. C. Tindle, and all of their transactions with the Tindle Cotton Company were with and through him.

The appellant bank, complainant below, seeks to differentiate this case from the one reported 132 Tenn., 152, 177 S. W., 74. It was there held that, where a draft on this bank was drawn by Tindle, who was also president of a mercantile corporation, which draft was signed by him as cashier in favor of the corporation's creditor, no notice of embezzlement or of an exceeding of authority by the cashier was thereby imparted.

Counsel for appellant seek to distinguish the two cases on the ground that in the pending case the con-

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cern favored by the cashier's act of embezzlement was a firm of which he was a member, instead of a corporation that was controlled by him.

We think the appeal should fail, and that the chancellor's ruling in favor of the Memphis firm should be affirmed.

While a partnership is not, strictly speaking, a person (*Holmes v. Sarrett*, 7 Heisk. [54 Tenn.], 560), yet it may be called a quasi entity. As is said in *Lindley on Partnership*, 166:

"Merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation."

In a recent opinion Mr. Justice Holmes observed that since *Lindley* wrote "the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations." The modern tendency of the law is "at this day to complete its recognition of a partnership as a body of itself, with its own means appropriated to the payment of its own debts." *Parsons, Partnership*, 449; 30 Cyc., 422; *Lacey v. Cowan*, 162 Ala., 546, 50 South., 281. A partnership owns its own property and owes its own debts.

"The well-established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership is derived from the acknowledgment that a partnership is

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a body by itself." *Menagh v. Whitwell*, 52 N. Y., 146, 11 Am. Rep., 683; 6 Words and Phrases, 5195.

And see *House v. Thompson*, 3 Head (40 Tenn.), 512, 516:

While not meaning to indicate that a copartnership may be treated as a distinct entity out and out, we do say that, when it comes to formulating rules in respect of notice conveyable by such drafts, courts do well to bear in mind the conception held by practical men of commerce and finance as to the nature of a firm. They are the ones to be affected, as drawers, takers, and users of exchange; and they are such by force of necessity. For that reason, if others were lacking, we decline to extend or enlarge the exception to the general rule as to the power of a cashier of a bank to issue drafts, so as to include in that exception drafts or cashier's checks drawn in favor of a firm of which he is a member, or its creditors; this on the ground that to do otherwise would be to seriously hamper commercial transactions, when sound policy dictates that the amplest currency of such exchange should be facilitated by the law, and not retarded.

Furthermore, the name of the "Tindle Cotton Company" was *prima facie* that of a corporation, and not a firm. It will be so treated by way of a presumption in the absence of proof. (*Ingle System Co. v. Norris*, 132 Tenn., 472, 178 S. W., 1113); a *fortiori* when, as in this case, the basic inquiry is whether notice was

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imparted thereby to those who in dealing with it took exchange issued by complainant bank in the "company's" behalf.

Finding no error in the decree of the chancellor, an affirmance results.

Bank of Com. & Trust Co. v. Burke.

BANK OF COMMERCE & TRUST Co. *et al* v. BURKE *et al*.*

(Jackson. April Term, 1916.)

1. LANDLORD AND TENANT. Leases. Legality of object.

Where a lease of a building does not itself set forth an illegal intent or use, and where nothing else appears, the lessor is not debarred from recovery of rent by his knowledge that the tenant intends to put the premises to illegal use. (*Post*, pp. 24, 25.)

Cases cited and approved: *Ashford v. Mace*, 103 Ark., 114; *Barbison v. Shirley*, 139 Iowa, 605; *Anheuser-Busch Brewing Ass'n v. Masin*, 44 Minn., 319; *Naff v. Crawford*, 48 Tenn., 111; *Tedder v. Odom*, 49 Tenn., 68; *Bond v. Perkins*, 51 Tenn., 364; *Jones v. Bank*, 56 Tenn., 455; *Puryear v. McGavock*, 56 Tenn., 461; *Henderson v. Waggoner*, 70 Tenn., 133; *Heart v. East Tenn. Brewing Co.*, 121 Tenn., 69; *Griel Bros. Co. v. Mabson*, 179 Ala., 444; *Hayton v. Seattle Brewing, etc., Co.*, 66 Wash., 248.

Case cited and distinguished: *McGavock v. Puryear*, 46 Tenn., 34.

2. LANDLORD AND TENANT. Leases. Legality of object.

Although a lease of a building does not itself set forth any illegal intent or use, if the lessor at the time of leasing knows and intends that the premises shall be used for an illegal purpose, such as prohibited sales of intoxicating liquor, and he does anything in furtherance of the transgression, he cannot recover rent. (*Post*, pp. 25, 26.)

Case cited and distinguished: *Harbison v. Shirley*, 139 Iowa, 605.

3. LANDLORD AND TENANT. Leases. Legality of object.
"Storehouse."

Where a building had long been occupied as a saloon, was so outfitted, was offered for rent as peculiarly valuable for a

*As to effect of landlord's knowledge that tenant intends to use premises in violation of law see notes in 19 L. R. A. (N. S.), 662, 59 L. R. A. (N. S.), 1104.

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saloon business, and after the leasing was used for a saloon by the lessee and sublessee with the knowledge of the agents of lessors, although it was leased in terms for use as a "storehouse," lessors could not recover rent (citing Words and Phrases, First Series, Storehouse). (*Post*, pp. 26, 27.)

Case cited and approved: *Commonwealth v. Whalen*, 131 Mass., 419.

4. LANDLORD AND TENANT. Leases. Legality of object.

If premises be leased for lawful purposes, the mere noninterference by landlord with subsequent illegal traffic of his tenant, after becoming aware of it, does not involve him in the tenant's guilt as showing participation. (*Post*, p. 27.)

Cases cited and approved: *Crofton v. State*, 25 Ohio St., 249; *Koester v. State*, 36 Kan., 27; *Kessler v. Pearson*, 126 Ga., 725.

5. LANDLORD AND TENANT. Actions for rent. Evidence of illegal use of premises.

Acts of the parties to the lease, before and after its making, may be proven to show their intent in making it. (*Post*, p. 27.)

Cases cited and approved: *Egan v. Gordon*, 65 Minn., 505; *Updike v. Campbell*, 4 E. D. Smith (N. Y.), 570.

FROM SHELBY

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—F. H. HEISKELL, Chancellor.

SIVLEY & EVANS, for complainant.

A. J. CALHOUN and W. M. STANTON, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This action was instituted to recover on six promissory notes executed to represent installments of the rent of a building in the city of Memphis. The defense relied on is that the building was demised by the landlord for use by defendants as a liquor saloon, in the face of laws in effect in that city prohibiting the sale of intoxicating liquors.

The building was leased to Burke by its owners through a real estate firm, on September 1, 1911, for a three-year term, the contract reciting that Burke as lessee covenanted "to use said building and premises for the purposes of a storehouse." The house had been used as a saloon for about forty years, and was equipped with swinging doors and other marks that would indicate its use to be that of a drinking stand. Burke in April, 1912, sublet, with the written consent of the owner, to Shea and Myers, who indorsed the rental notes. At that time the building contained regular bar fixtures, and in it a business was being run in open violation of the law referred to. Shea and Myers, as indorsers, are sued along with Burke. The notes are those that represent the installments of rent for the last six months of the term. The owners were non-residents of the city, and all transactions in their behalf were through a local real estate agency. There was knowledge on the part of these agents that a saloon would be conducted in the structure.

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The question of the effect of the use of demised property for an illegal purpose upon the contract of lease is, upon several of its phases, a vexed one.

The English courts hold to the view that where the intention of the lessee is unlawful, the mere fact that the other party knows of such purpose renders the contract illegal and unenforceable. A number of the courts of this country have followed the English rule, while others adhere to the doctrine that mere knowledge on the part of the lessor of property that the lessee intends to make an illegal use of it does not render the contract void so as that the lessee may defeat the collection of the rent.

Under the rule of the more recent cases, if, indeed, not the one sustained by the weight of authority in America, mere knowledge on the part of a lessor that the lessee intends to violate the law on or by the use to be made of the property does not make the contract of lease illegal. The reasoning in support of this rule runs as follows: The contract does not take the color of illegality, unless the intent that gave it existence was illegal and mere knowledge is not intention. There are two parties to the contract and the intent of one, the lessee, is not the intent of both, or the mutual or common intent, or the intent of the contract. There must be unity of intention to bring the contract to denunciation. The lessor is not the keeper of the conscience of the lessee, nor his policeman. The intention of the lessee at the time the contract is entered into may be changed before the property is put to actual

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use, and that use may turn out to be a lawful one. His purpose is not subject to the control of the lessor; and it is not just to permit his making an inhibited use of the premises to cloud the motive of the opposite party, and thus defeat him in the realization of his rentals. *Ashford v. Mace*, 103 Ark., 114, 146 S. W., 474, 39 L. R. A. (N. S.), 1104, Ann. Cas., 1914B, 804; *Harbison v. Shirley*, 139 Iowa, 605, 117 N. W., 963, 19 L. R. A. (N. S.), 662; *Anheuser-Busch Brewing Ass'n v. Masin*, 44 Minn., 319, 46 N. W., 558, 9 L. R. A., 506, 20 Am. St. Rep., 580, and cases cited in these authorities.

While the particular question, as it relates to lease contracts, has not been passed on by this court in any reported case, the principle underlying the above decisions has been recognized in the analogous cases of sales and loans.

McGavock v. Puryear, 6 Cold. (46 Tenn.), 34, dealt with a loan of money with knowledge on the part of the bank that the borrower would purchase horses for a Confederate regiment in the war between the States. The court said:

“To guard against misapprehension of the principle upon which the decision in this case is made, we state, succinctly and definitely: The mere knowledge of the bank of the illegal purpose to which Park and others intended to apply the proceeds of the note, is not, of itself, enough to implicate the bank in the illegality of the transaction, and so affect the note with the taint of illegality. In order to so implicate the bank and affect the note, it must be shown that the bank made the

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loan, with the purpose, on its part, to furnish money to enable the borrower to do the illegal act.

“We repeat, the mere knowledge of the lender of money, of the illegal use that the borrower intends to make of the money, is not enough, of itself, to fix the stain of illegality upon the lender. In order to do so, it must appear that the lender made the loan for the purpose to enable the borrower to do the illegal act.”

The cases of *Naff v. Crawford*, 1 Heisk. (48 Tenn.), 111, *Tedder v. Odom*, 2 Heisk. (49 Tenn.), 68, 5 Am. Rep., 25, *Bond v. Perkins*, 4 Heisk. (51 Tenn.), 364, *Jones v. Bank*, 9 Heisk. (56 Tenn.), 455, *Purveyar v. McGavock*, 9 Heisk. (56 Tenn.), 461, and *Henderson v. Waggoner*, 2 Lea (70 Tenn.), 133, 31 Am. Rep., 591, announce the same doctrine, and in one or more of these cases the English rule is in terms rejected.

We therefore are of opinion that where a lease of a building is made that does not itself set forth an illegal intent or use and where nothing else appears, the above authorities apply to sustain the lessor in a recovery under the contract.

A clear example of an illegal contract of lease is where the instrument sets out in its face that the premises are to be used for a purpose that is denounced by the law; as in *Heart v. East Tenn. Brewing Co.*, 121 Tenn., 69, 113 S. W., 364, 19 L. R. A. (N. S.), 964, 130 Am. St. Rep., 753, where the language of the lease in judgment was regarded as restricting the use of the premises to saloon purposes. That case was so construed and cited in, and followed by, *Griel Bros. Co.*

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v. *Mabson*, 179 Ala., 444, 60 South., 876, 43 L. R. A. (N. S.), 664; and see *Hayton v. Seattle Brewing, etc., Co.*, 66 Wash., 248, 119 Pac., 739, 37 L. R. A. (N. S.), 432. In such case there is, of course, a common intent manifested.

And where additional to such knowledge there appears an intention on the part of the lessor at the time of the demise that the premises shall be used for an illegal purpose, such as for the prohibited sales of intoxicating liquor, he cannot recover rent. If he participates in the intent, however slightly, or if he does any act in aid of the unlawful purpose, however slight, it suffices to defeat a recovery. The lessor must, however, do or contribute something in furtherance of the transgression.

"The law finds itself in close quarters at this point, and is confronted with danger at either side. On the one hand, it must needs withhold its sanction from contracts entered into for criminal purposes; and, on the other hand, it ought not to go so far as to offer undue inducement to beneficiaries of contracts to taint them with criminality for the very purpose of avoiding liability thereon after receiving the benefits of performance by the other party, lest the latter evil become greater than the first. While, therefore, it is true that the line of distinction drawn in the authorities above cited is somewhat fine, it is also true that it required a thin blade to divide the 'joints and marrows' of one evil to be checked and another to be avoided." Harbi-

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son v. Shirley, 139 Iowa, 605, 117 N. W., 963, 19 L. R. A. (N. S.), 662.

The facts of the instant case, in our opinion, show on the part of the landlord a tainting participation in or contribution to the intention to so use the building. The building had been occupied as a liquor saloon for about forty years. Indeed, it had been so long and regularly used for that purpose that it had taken on the designation of the "Old Bay Horse"; and it was provided with swinging doors and other outfitting suitable for saloon purposes. Attaching to such a place of business was an element of rental value that may be likened to good will; it was, we may fairly infer from its long-time use a place to which a line of customers were accustomed to resort. When it was offered on the market for rent, through real estate agents, it was held out as peculiarly valuable as a stand for the sale of intoxicating liquors. It would bring a greater return to the landlord for that use than it would for use as a jeweler's shop or a drug store. Its existence, in the condition it was at the date the lease was executed on 1st day of September, 1911, was an inducement to one offering to lease it to use it for the purpose. It was peculiarly adapted to that use, and not equally to another; and, as seen, it had a greater value to both parties when so applied. An owner of property may not in this way demise it, taking the augmented benefits, and be heard to claim that he has not participated in the intention that vitiates. The parties, cannot hood-

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wink the law by inserting in the lease contract a provision that the property is to be used as a storehouse.

A "storehouse" is a building in which goods of any kind are kept for sale, and the term is broad enough to include the sale of liquors as goods; and when used in a lease contract does not necessarily negative a use of the building for the dispensing of such liquors, especially where the structure showed peculiar adaption therefor. *Commonwealth v. Whalen*, 131 Mass., 419; 7 Words and Phrases, 6672.

If the house be leased for a lawful purpose, the mere noninterference by the landlord with the subsequent illegal traffic of his tenant, after having become aware of it, does not involve him in the tenant's guilt as showing participation. *Crofton v. State*, 25 Ohio St., 249; *Koester v. State*, 36 Kan., 27, 12 Pac., 339; *Kessler v. Pearson*, 126 Ga., 725, 55 S. E., 963, 8 Ann. Cas., 180.

However, acts of the parties to the contract, both before and after the making of the lease, may be proven to show their intent in making the contract. *Egan v. Gordon*, 65 Minn., 505, 68 N. W., 103; *Updike v. Campbell*, 4 E. D. Smith (N. Y.), 570; *Kessler v. Pearson*, *supra*.

We think there was no error in the decree pronounced by the court of civil appeals holding the rental sums not to be collectible in this action. Writ of *certiorari* denied.

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ELIZABETH H. NEILL v. METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK.

(*Jackson*. April Term, 1916.)

JUDGMENT. Notwithstanding verdict. Party entitled to move.

Where a case had been submitted to the jury and judgment entered on a verdict for the plaintiff, a judgment *non obstante verdicto* for the defendant rendered by the trial judge, at the request of the defendant, was error.

Case cited and approved: *Kirk v. Salt Lake City*, 32 Utah, 143.

Case cited and distinguished: *Bledsoe v. Chouning*, 20 Tenn., 85.

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. B. PITTMAN, Judge.

H. H. HONNOLL, for plaintiff in error.

BROWN & ANDERSON, for defendant in error.

MR. A. R. GHOLSON, Special Judge, delivered the opinion of the Court.

This is a suit by the plaintiff, Mrs. Elizabeth H. Neill, to recover from defendant, the Metropolitan Cas-

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ualty Insurance Company of New York, upon an accident policy of insurance issued by it to William C. Neill, Jr., for \$1500, March 24, 1914. Mrs. Neill is the beneficiary in said policy, and the Casualty Insurance Company obligated itself to pay said sum in the event the insured sustained accidental injuries causing his death, solely and independently of all other means, on due notice and proof of his accidental death.

The case was heard by the circuit judge and a jury October 29, 1915. At the conclusion of all the evidence the defendant made a motion for peremptory instructions for a directed verdict in its favor, which motion was overruled by the court and due exception taken. The jury returned a verdict in favor of the plaintiff in the sums of \$1500 and \$112.25, amounting to \$1612.25, the face of the policy, and interest, and judgment was entered against the insurance company for said amount and costs.

Seasonably thereafter the defendant filed its motion for a new trial upon several grounds, among others being the following:

“The court erred in overruling the motion of counsel for defendant for a directed verdict at the conclusion of all the testimony. There was not a single fact established by the evidence that tended to show that the death of William C. Neill was accidental, but all of the facts show that the shot was fired by the hand of William C. Neill, Jr., and there was no dispute or contradiction as to that fact shown. Such being the fact, there was no fact for the jury to find and the deter-

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mination of the case became one of law to be decided by the court."

Afterwards, and on November 6, 1915, the defendant moved the court for a judgment in its favor, notwithstanding the verdict for the defendant or for a new trial. Whereupon the circuit judge granted the motion for a judgment in defendant's favor *non obstante veredicto*, and overruled said motion for a new trial, stating that the evidence in favor of suicide of William C. Neill, Jr., was so overwhelming that reasonable minds could not differ in regard thereto. Judgment was thereupon entered in favor of the Casualty Insurance Company and against the plaintiff, Mrs. Neill, and the surety on her cost bond. To this action of the court the plaintiff excepted, and filed her motion for a new trial, among other grounds alleging that it was error on the part of the circuit judge to set aside the verdict of the jury and dismiss her suit notwithstanding said verdict. She also insisted in her motion for a new trial that the circuit judge, if dissatisfied with the verdict of the jury, could only grant a new trial.

Plaintiff duly excepted to the action of the circuit judge, and prayed and perfected her appeal in error to the court of civil appeals.

The court of civil appeals affirmed the action of the circuit judge, being of opinion that the proof was not only overwhelming that the insured shot himself, but, so far as they could discover, there was no probative evidence to the contrary. That court permitted the judgment *non obstante veredicto* to stand as rendered

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by the circuit judge after the issues had been submitted to a jury and a judgment entered in accordance with said verdict.

The case is here upon a petition for *certiorari* by Mrs. Neill asking that the action of the court of civil appeals be reviewed. Able briefs have been submitted by counsel for both sides.

We have carefully examined the entire record, and are satisfied that no judgment should be sustained in favor of the plaintiff against the insurance company, and that both the circuit judge and the court of civil appeals reached the correct result in deciding this case in favor of the insurance company and against the plaintiff.

We are not prepared, however, to go to the extent of holding that in a suit at law, after the case has been submitted to a jury, a verdict rendered by the jury in favor of the plaintiff, and judgment entered in accordance with the verdict, that such a judgment *non obstante veredicto* can then be rendered by the trial judge in favor of the defendant.

A judgment of this character is thus defined by Shipman's Common-Law Pleading, section 82:

"Where a plea is in good form, but shows no valid answer to the merits of the action, the court will order judgment for the plaintiff, notwithstanding the verdict for the defendant."

"At common law, the plaintiff was entitled to judgment *non obstante veredicto* upon a bad plea, and a replender was not grantable in favor of the party who

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makes the first fault-finding plea." • *Bledsoe v. Chouning*, 1 Humph., 85, cited approvingly in *Ragsdale & Mabry v. Gossett*, 2 Lea, 729.

Volume 11, pp. 912, 913, and 917, Ency. of Pleading & Practice, comments as follows with reference to this judgment, citing numerous authorities in support thereof:

"The motion was granted at common law upon motion of the plaintiff only, when the answer confessed the cause of action set up in the complaint and set up matters in avoidance which, though true, were not sufficient in law to constitute a defense." Page 912.

"It was never to be granted when made by the defendant." Page 913.

"It was never granted upon the ground that the evidence was not sufficient to sustain the verdict." Page 917.

We quote the following from 23 Cyc. pp. 778, 779:

"At common law a judgment *non obstante veredicto* is one which may be entered by order of the court for plaintiff in an action at law, notwithstanding the jury have found a verdict for defendant, where it is apparent from defendant's plea that he can have no merits. The granting of such a judgment rests very much in the discretion of the court, but such a judgment is always upon the merits, and should never be granted but in a very clear case, and this procedure should never be used as a means of reviewing and reversing the decision of the jury on questions of fact which are properly within their exclusive province.

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“But in some States, where special findings of the jury are in direct conflict with the general verdict, it is the practice to grant a judgment notwithstanding the verdict. But this can be done only where the special findings are so irreconcilably in conflict with the general verdict that both cannot stand. . . . A judgment *non obstante veredicto* should not be granted because the verdict may be contrary to the weight of the evidence or where there is evidence to sustain the verdict, although it may be uncertain or unconvincing, or where the evidence is conflicting, and therefore properly to be weighed by the jury. But such a judgment may be given if there is an entire failure of evidence, or if the evidence shows as a matter of law that the verdict should have been directed, and it is not probable that a different result would have been reached on another trial.”

See, also, the case of *Kirk v. Salt Lake City*, 32 Utah, 143, 89 Pac., 458, 12 L. R. A. (N. S.), 1021, note.

We have carefully examined all cases in Tennessee treating of such judgments, and have not found any where such a verdict was granted upon application of the defendant in cases at law.

Judge Wilson, in delivering the opinion of the court of civil appeals, said:

“Now it is true that the trial judge might have granted the motion for a new trial instead of rendering a judgment notwithstanding the verdict of the jury; but why reverse his action and send it back for a new

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trial, when, under the evidence, no judgment could possibly, in the law as we understand it, be permitted to stand against the insurance company.”

As heretofore stated, we are clearly of opinion that the right result was reached by the learned trial judge, but we think that he should have sustained the motion of the defendant for a directed verdict at the conclusion of all the evidence.

We are therefore of opinion that the petition for *certiorari* should be disallowed for the reasons herein stated.

Boswell v. Barnum & Bailey.

J. M. BOSWELL v. BARNUM & BAILEY *et al.*
(three cases).*

(*Jackson*. April Term, 1916.)

1. THEATERS AND SHOWS. Right to admission.

The right of a purchaser of a ticket to enter and remain at a theater, circus, race track, or private park is a mere revocable license. (*Post*, pp. 38, 39.)

Cases cited and approved: *Meisner v. Ferry Co.*, 154 Mich., 545; *Collister v. Hayman*, 183 N. Y., 250; *Horney v. Nixon*, 213 Pa., 20; *W. W. V. Co. v. Black*, 113 Va., 728; *Marrone v. Wash. Jockey Club*, 227 U. S., 633.

2. THEATERS AND SHOWS. Right to admission.

No action will lie, in the absence of statute regulating admission to places of amusement, for refusal to admit any person. (*Post*, pp. 38, 39.)

3. THEATERS AND SHOWS. Right to admission.

If the license of a ticket holder to enter a place of amusement be revoked, and the ticket holder ejected without necessary force, his only remedy is an action for breach of the contract, in which damages are limited to the ticket price and expenses incident to the purchase of the ticket and attending the place of amusement. (*Post*, pp. 38, 39.)

4. THEATERS AND SHOWS. Conduct of Parties.

The patrons of places of amusement are required by law to demean themselves in an orderly and civil manner. (*Post*, pp. 39, 40.)

Cases cited and approved: *State v. Watkins*, 123 Tenn., 502; *Interstate Amusement Co. v. Martin*, 8 Ala. App., 481; *Weber-Stair Co. v. Fisher* (Ky.), 119 S. W., 195.

*As to the nature and extent of rights of holder of ticket of admission to place of amusement, see notes in 1 L. R. A. (N. S.), 1184, 1188, and 43 L. R. A. (N. S.), 961, and upon the question of humiliation as element of damages for exclusion from a place of, see note in 14 L. R. A. (N. S.), 1242 and 38 L. R. A. (N. S.), 204.

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5. THEATERS AND SHOWS. Liability for uncivil conduct towards patrons.

The proprietor of a place of amusement is required to exercise civil conduct toward those he permits to enter and remain on his premises, and is liable in tort for breach of this duty. (*Post*, pp. 40, 41.)

6. THEATERS AND SHOWS. Injuries to persons attending. Acts of employe.

Circus ushers, in acting uncivilly towards patrons in assigning seats, though acting in excess of their authority, *held* to be acting within the general scope of their authority. (*Post*, p. 41.)

Case cited and approved: *Terry v. Burford*, 131 Tenn., 451.

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—H. W. LAUGHLIN, Judge.

BELL, TERRY & BELL, for plaintiffs.

THOS. M. SCRUGGS, for defendants.

MR. JUSTICE GREEN delivered the opinion of the Court.

These are three actions in tort brought against Ringling Bros., doing business as Barnum & Bailey, to recover damages for indignities suffered by the plaintiffs below from employees of the defendants below.

Plaintiffs in error operated a circus and were giving an exhibition in Memphis. J. M. Boswell purchased tickets for himself, his wife, Carrie M. Boswell, and his sister Zula M. Boswell, entitling them to reserved seats at a performance given by the circus of the plain-

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tiffs in error. The coupons were handed to an usher employed by plaintiffs in error, and the usher undertook to show the Boswells to the seats reserved by them. These particular seats were found to be occupied, and the usher requested the Boswells to take adjacent seats, to which they had no objection. A little later other persons arrived with tickets calling for those seats in which the Boswells had been located, and at the request of an usher the Boswells moved to some other seats nearby. Still later persons arrived having tickets which called for the seats where the Boswells had last been located, and the usher then undertook to move them to undesirable seats near the top of the tent, to which they objected, and Boswell asked that the party be placed then in the particular seats which their own tickets called for and which they had failed to claim originally because of the usher's request.

Testimony offered in behalf of the Boswells shows that this demand by Boswell was made in a courteous manner, but that the usher became angered, refused to accede to the request of Boswell, and addressed insulting and profane language to him. Other ushers came up, and the abuse of the Boswell party was continued. One of the ushers accused Boswell of being armed. Boswell stepped away for a moment to speak to a city policeman standing near, and while he was gone one of the ushers addressed profane language to the ladies of the party. The weight of the testimony indicates that the conduct of the circus employees was outrageous. All this occurred in the presence of the

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large crowd assembled and attracted the attention of those near.

Under these circumstances the jury returned a verdict in favor of each plaintiff below for \$500, and these several judgments were affirmed by the court of civil appeals. The case comes to us on petition for *certiorari* of Ringling Bros.

It is insisted that there was no evidence to support the verdict, and that the defendants below were entitled to peremptory instructions in their favor.

It is true under the great weight of authority that the right of the purchaser of a ticket to enter and remain at a theater, circus, race track, or private park is a mere revocable license. The proprietor of an amusement enterprise may deny admission to any one, and one having entered may be forced to depart on request, and, if he refuses to depart, he may be removed with such force as is necessary to overcome his resistance. No action will lie, in the absence of some statute regulating admission to places of amusement, for a refusal to admit any person. If the license to enter be revoked by the proprietor and the ticket holder ejected without unnecessary force, the only remedy of the holder of the ticket is an action for breach of the contract, and his damages are limited to the price of the ticket and any expenses incident to the purchase of the ticket and attending the place of amusement. The authorities are practically uniform upon the foregoing propositions. *Meisner v. Detroit, B. I. & W. Ferry Co.*, 154 Mich., 545, 118 N. W., 14, 19 L. R. A. (N. S.), 872,

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129 Am. St. Rep., 493; *Collister v. Hayman*, 183 N. Y., 250, 76 N. E., 20, 1 L. R. A. (N. S.), 1188, 111 Am. St. Rep., 740; 5 Ann. Cas., 344; *Horney v. Nixon*, 213 Pa., 20, 61 Atl., 1088, 1 L. R. A. (N. S.), 1184, 110 Am. St. Rep., 520, 5 Ann. Cas., 349; *W. W. V. Co. v. Black*, 113 Va., 728, 75 S. E., 82, Ann. Cas., 1913E, 558; *Marrone v. Washington Jockey Club*, 227 U. S., 633, 33 Sup. Ct., 401, 57 L. Ed., 679, 43 L. R. A. (N. S.), 961.

Amusement places are private enterprises and the law does not confer upon the public the right to demand admission thereto. No legal duty is breached by refusing admission to any one, or excluding any one after admission. If such person has bought a ticket, there is a breach of contract, but there is no tort.

We think, however, that until the license to enter and remain at a place of amusement is revoked the law does put upon those operating such places the duty of civil treatment of their patrons present. Large crowds are assembled at these places, and, unless those in charge are held to the duty of civility, breaches of the peace will necessarily follow.

Under the common law it is a misdemeanor for a person at any public gathering, collected for a lawful purpose, to be guilty of conduct which will disturb such a gathering. *State v. Watkins*, 123 Tenn., 502, 130 S. W., 839, 30 L. R. A. (N. S.), 829; 1 Bishop's New Criminal Law, section 542; 2 Wharton's Criminal Law (10th Ed.), section 1556. The patrons of places of amusement are required by law to demean themselves in an orderly and civil manner. It seems to us the law

necessarily imposes a like duty upon those conducting places of amusement. Those lawfully assembled are entitled to demand that order be preserved in such gatherings, and conspicuously rude and unseemly treatment of their patrons by the owners of theaters, circuses, and such enterprises, or their employees, is an invasion of the legal right of such patrons to participate in lawful gatherings free from disturbance.

The supreme court of Alabama has held that it is the duty of the proprietor of a theater to accord civil treatment to the purchaser of a ticket while the latter is exercising the privilege for which he has contracted; that such a duty is one that may be breached by the proprietor himself or by his employees while acting within the scope of their employment, and such mistreatment may consist in the use of uncivil and offensive language addressed to the ticket holder. *Interstate Amusement Co. v. Martin*, 8 Ala. App., 481, 62 South., 404.

Likewise the Kentucky court of appeals has held that the proprietor of a theater is liable for rude and insulting conduct of his employees toward a patron present at the theater. *Weber-Stair Co. v. Fisher* (Ky.), 119 S. W., 195.

We are not aware whether the two cases just cited were actions in tort or rested on contract. The first appears to have been a suit on contract.

We are of opinion, however, that as a legal duty the proprietor of a place of amusement is required to exercise civil conduct toward those he permits to enter

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and remain on his premises. For a breach of such legal duty an action in tort will lie.

The servants of the plaintiffs in error in this case, no doubt acted in excess of their authority, but they were ushers charged with the duty of assigning patrons of the circus to seats and were undoubtedly acting within the general scope of their authority.

In the late case of *Terry v. Burford*, 131 Tenn., 451, 175 S. W., 538, L. R. A., 1915F, 714, this court reviewed all the authorities, and held the master to be liable for the acts of the servant within the general scope of his employment while engaged in the master's business and done with the view to the furtherance of that business and the master's interests, whether such acts were committed negligently, wantonly, or even willfully.

We do not regard the verdicts found as excessive, and it follows that the judgments of the court of civil appeals in all three cases are affirmed.

Preslar v. Railroad.

E. E. PRESLAR v. MOBILE & O. R. Co.

(*Jackson*. April Term, 1916.)

1. RAILROADS. Injuries to persons on tracks. Actions. Statute.

Shannon's Code, section 157, subd. 4, providing that every railroad company shall keep the engineer, fireman, or some other person on the locomotive always on the lookout ahead, and when any person appears upon the railroad, the alarm whistle shall be sounded, the brakes put on, and every possible means employed to stop the train and prevent an accident, does not apply where a trespasser, walking along the railroad right of way, was struck by a piece of timber which became loose and projected from a lumber car; for there was nothing to show the trespasser's danger to the engineer, who did not know of projecting timber. (*Post*, pp. 45, 46.)

Cases cited and approved: Cincinnati, etc., R. Co. v. Brock, 132 Tenn., 477.

Code cited and construed: Sec. 1574 (S.).

2. RAILROADS. Injuries to persons on tracks. Trespasser.

Where the servants in charge of a train did not know that a piece of timber was projecting from a lumber car, they do not owe a trespasser on the right of way any duty to exercise care to prevent him from being struck by the projecting timber. (*Post*, p. 46.)

Cases cited and approved: Todd v. Cincinnati, etc., R. Co., 185 S. W., 62; Carr v. Mo. Pac. R. Co., 195 Mo., 214.

3. RAILROADS. Injuries to persons on tracks. Actions. Res ipsa loquitur.

Where a trespasser on a railroad right of way was struck by a piece of timber which projected from a lumber car and it did not appear how the lumber was loaded or whether the timber

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was caused to project by reason of negligence of the railroad company and there was no showing as to how long it had projected, negligence on the part of the railroad company cannot be based on the doctrine of *res ipsa loquitur*. (*Post*, pp. 46, 47.)

Case cited and approved: Chicago, etc., R. Co. v. Reilly, 212 Ill., 506.

Case cited and distinguished: Louisville, etc., R. Co. v. Marlow, 169 Ky., 140.

FROM GIBSON

Appeal from the Circuit Court of Gibson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—THOS. E. HARWOOD, Judge.

DEASON, ELDER & HOLMES, for plaintiff.

COOPER & CLARK, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

W. A. Lemon, the intestate of plaintiff, was killed by a piece of scantling which projected from a carload of lumber in a train operated by defendant through the city of Trenton. Intestate was, or had been, a railroad man in his home State of Illinois, and at the time of his death was on a visit to Trenton. It appears that he had taken a walk down defendant's line of railway some distance south of the depot, and had seated him-

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self on the end of a cross-tie in the main line. Opposite him there was a freight train standing on a siding that was east of and paralleled the main line, the engine heading south and standing near the switch point south of where the deceased sat. Another of defendant's trains, a through freight train, coming in from the south on the main line, blew for the station, and the bell was also ringing. Deceased arose and started towards the depot. This placed him between the two freight trains. The piece of scantling that projected from the lumber car which was about seven cars back of the engine of the north-bound train, struck plaintiff's intestate, killing him. The scantling protruded about six feet from the edge of the car on its east side.

The track was straight enough to have permitted deceased to have seen the projection had he looked back. This piece of lumber scraped the cab of the engine on the side track in passing it, but the proof does not show when, if at all, before that it had become detached and swung out from the car. Actual knowledge of its projection on the part of the employees operating the through freight train was not shown, though it could have been seen from the engine and the caboose.

No reason or excuse for deceased's being at the particular place is given in pleading or proof; it is not shown that he was walking, when struck, along a path that was customarily used by the public as a walkway. On the contrary, counsel for the plaintiff admit that deceased was a trespasser.

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At the close of the plaintiff's testimony the defendant company moved for peremptory instructions in its favor, which motion was sustained. The court of civil appeals affirmed the judgment.

It is urged in this court for error that there was a failure on the part of the enginemen on the through train to observe the precautions prescribed by the statute, and that the railway company is liable.

The statute (Code, Shannon, section 1574, subsec. 4) provides that:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent the accident."

In a recent case it was held that burden of compliance with this statute does not arise until the person appears on the track, or within striking distance of the track, as an obstruction. *Cincinnati, etc., R. Co. v. Brock*, 132 Tenn., 477, 178 S. W., 1115.

"Striking distance of the track," in this connection means the sweep of the rolling stock in the train as normally constructed and operated. If any unit of the train is above the usual width, its reach or the effect of its reach would be the measure of striking distance; but within the meaning of that term it would not be fair to include casual or sporadic projections such as the one here appearing. The enginemen, on the look-

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out ahead, could not be held to anticipate the existence of such a projection as an enlargement of the train's sweep, endangering one walking or standing beside the track. The statute, therefore, had no application to the facts of the case.

Was there a case for the jury on the count that averred common-law negligence?

We think it manifest that until the employees operating the through train had knowledge, actual, or constructive arising from the continued existence of the projection, there was imposed no duty towards deceased as a trespasser at such a place where persons are not shown customarily to be, or where their presence was to be anticipated. He did not appear to them to be in a place of danger, so as to present a case of discovered peril. *Todd v. Cincinnati, etc., R. Co.*, 185 S. W., 62; *Carr v. Missouri Pac. R. Co.*, 195 Mo., 214, 92 S. W., 874.

There was no evidence as to the manner in which the lumber had been loaded on the car, or whether the projection was caused or occasioned by any negligence of the defendant or by a mere accident; and, as noted above, it was not shown to have been in the dangerous position for such a length of time as to give rise to constructive knowledge of its position or of the danger it threatened. The rule of *res ipsa loquitur* is not applicable on these facts. *Chicago, etc., R. Co. v. Reilly*, 212 Ill., 506, 72 N. E., 454, 103 Am. St. Rep., 243.

The court of appeals of Kentucky used this language in a recent case which involved an injury to a person

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who was walking in a path at the end of the tross-ties and was struck by an iron pipe which swung out from a passing train:

The fact that the piece of iron was seen dragging along from the car two hundred feet from the place where the party was hurt, "without showing what connection it had with the equipment or the length of time it had been in the condition observed or what caused its loose condition, is insufficient to show any affirmative act of negligence rendering the railroad company liable." *Louisville, etc., R. Co. v. Marlow*, 169 Ky., 140, 183 S. W., 470.

The motion for peremptory instructions was properly granted. Affirmed.

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LEVI ROBERTS v. NASHVILLE, C. & ST. L. RY. CO.

(*Jackson*. April Term, 1916.)

1. COMMERCE. Interstate commerce. Validity of contract.
Complaint.

A complaint for breach of contract by an interstate carrier for an expedited shipment which does not show that the carrier had no published tariff covering such shipments, does not show that the contract was illegal under the Interstate Commerce Act of Feb. 4, 1887, chapter 104, section 3, 24 Stat. 380 (U. S. Comp. St. 1913, section 8565), and the Elkins Act, Feb. 19, 1903, chapter 708, 32 Stat. 847. (U. S. Comp. St. 1913, sections 8597-8599). (*Post*, pp. 50-54.)

Acts cited and construed: Acts 1887, ch. 104, Sec. 3.

Case cited and distinguished: Chicago, etc., R. Co. v. Kirby, 225 U. S., 155.

2. COMMERCE. Interstate commerce. Validity of contract.

In an action for breach of an interstate carrier's contract for an expedited shipment, where it appeared that there was no published tariff for such shipment, the contract was illegal under the Interstate Commerce Act and the Elkins Act, since it gave an undue advantage to the shipper, and there could be no recovery thereon. (*Post*, pp. 50-54.)

FROM HENRY

Appeal from the Chancery Court of Henry County.

—J. W. ROSS, Chancellor.

FITZGERALD HALL and S. P. FITZHUGH, for appellant.

TAYLOR & HUDSON, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed to recover \$706.50, as the value of certain tobacco delivered by complainant,

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Roberts, to the railway company at Puryear, Tenn., under a contract to be transported to and delivered at Paducah, Ky.; and it is alleged that the tobacco had never been so transported and delivered.

The chancellor held that complainant was seeking to recover on a contract that called for an expedited delivery of tobacco on a specified date fixed; that such a contract is void under the federal statute, and on that ground dismissed the bill of complaint.

Complainant, Roberts, appealed to the court of civil appeals, and that court reversed the ruling of the chancellor, and entered a decree in favor of complainant in the amount sued for.

The testimony shows that Roberts placed in the company's depot at Puryear the tobacco, and that while it yet remained in the depot it was destroyed by a fire which originated on premises other than defendant's, but was communicated to the depot. Negligence on the part of the company in respect of the fire is not shown.

The bill of complaint alleged among other things:

"That complainant in the month of June, 1913, delivered to defendant in the town of Puryear, Tenn., a station along defendant's railway between Memphis and Paducah, about fifty miles south of last-named place, five hogshead of tobacco, to wit, 9,000 pounds worth \$706.50, on a contract that the defendant would deliver said tobacco to complainant at Paducah, Ky., in good order on the morning of Tuesday, June 17,

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1913, the defendant for a valuable consideration contracting so to do.”

After proof was introduced, but before the chancellor had announced his conclusion, complainant was granted permission to and did amend the bill of complaint by adding after the words “June 17, 1913,” the words “that said time was a reasonable time within which to transport said tobacco from Puryear to Paducah, a distance of about fifty miles.”

The ruling of the chancellor was evidently based upon the decision in the case of *Chicago, etc., R. Co. v. Kirby*, 225 U. S., 155, 32 Sup. Ct., 648, 56 L. Ed., 1033, and upon the provisions of the Interstate Commerce Act and the acts amendatory thereof.

The Interstate Commerce Act, section 3 (U. S. Comp. St., 1913, section 8565) provides:

“That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

The Elkins Act of February 19, 1903, also inhibited the giving or acceptance of any sort of advantage or discrimination in interstate shipments.

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In the Kirby Case above referred to the supreme court of the United States, in an opinion by Mr. Justice Lurton, held that a contract which provided for an expedited shipment was void and unreasonable, saying:

“The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not exouse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

“For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

“The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

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“An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It also illegal because it is an undue advantage, in that it is not one open to all others in the same situation. . . .

“The declaration counted only upon the breach of a special contract which was illegal. There was no count based upon the carrier’s liability for negligence in not promptly shipping and delivering. The judgment was rested upon the damages resulting from the breach of the special contract, and not at all upon the liability of the carrier otherwise.”

The railway company contended that the bill of complaint alleged an illegal contract of shipment. But we think the court of civil appeals properly held this insistence not to be sustainable.

In the Kirby Case, as shown by the above quoted language, it is recognized that there may be a valid special agreement for an expedited shipment, in the expression that for such a special service and high responsibility the railway company might exact a higher rate, but to do so it must make and publish a rate open to all. That is, the published tariffs must set forth the special rate for the special service to be rendered in expediting shipment. When, therefore, the bill set forth a contract for the expedition of the shipment without showing at the same time that the published

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tariffs did not cover the same, the bill of complaint did not show on its face the invalidity of the contract sued on.

However, when proof was introduced the tariffs were exhibited and they, as was true in the Kirby Case, showed that there was no published rate for such special service. It was thus made manifest that the special contract alleged was an illegal one. The bill of complaint set forth no other than the special contract, which was thus illegal. There was, in other words, no allegation setting up a carrier's liability for negligence in not promptly shipping and delivering under a regular contract of shipment. This presented the same situation which appeared in the Kirby Case.

We fail to see why the chancellor was in error in his holding that complainant could not recover on this state of the pleadings. The bill plainly sets out as the basis of the action a definite special contract for an expedited shipment, within the meaning of the Kirby Case. Under the rule of *allegata et probata* there was no allegation to which proof of a negligent holding of the tobacco in the depot for an unreasonable time or of a failure to deliver within a reasonable time could have been based. The amendment merely had the effect to incorporate a charge that in legal effect the special contract time for delivery was a reasonable time within which to transport the tobacco from Puryear to Paducah. In fairness to the parties and the court below the amendment cannot be stretched so as to be made to constitute a charge of a violation of a

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general contract of ordinary carriage as contradistinguished from the special contract for expedited carriage.

Reverse the decree of the court of civil appeals, and affirm that of the chancery court.

Steel Const. Co. v. Walker.

MEMPHIS STEEL CONSTRUCTION COMPANY v. WALKER.*

(Jackson. April Term, 1916.)

ATTORNEY AND CLIENT. Lien. Issuance of summons.

Acts 1899, chapter 243, provides by sections 1 and 2 that attorneys of record be begin a suit in a court of record shall have a lien upon plaintiff's right of action from the filing of the suit, and that any attorney who is employed to prosecute a suit already brought shall have a lien on plaintiff's right of action from the date of his employment, provided, the record will first be made to show such employment by notice on the rule docket of such court or written memorandum filed with the papers in the case or notice served on defendant. Shannon's Code, sections 4445, 4518, declare that all civil actions in courts of record are commenced by summons. Defendant compromised an action by plaintiff before summons was served. *Held*, that until service of summons or some other notice of institution of the suit, plaintiff's counsel had no lien which he could assert against defendant.

Acts cited and construed: Acts 1899, ch. 243.

Cases cited and approved: Railroad v. Wells, 104 Tenn., 706; Northup v. Haywood, 102 Minn., 307; Florida, etc., R. Co., 104 Ga., 353.

Code cited and construed: Secs. 4445, 4518 (S.).

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—H. W. LAUGHLIN, Judge.

*The question of constitutionality of statute providing for attorney's liens, is discussed in a note in 40 L. R. A. (N. S.), 529.

Steel Const. Co. v. Walker.

JOSEPH HANOVER, for plaintiff.

JOHN W. SPENCE, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The appeal involves the right of an attorney to enforce against the defendant a lien on the cause of action of his client, plaintiff in the suit.

The attorney brought suit in a court of record in behalf of Walker to recover damages of the construction company for personal injuries incurred in its service. After the summons was sued out, but before its service on the defendant company, the latter effected a settlement with Walker, taking from him a receipt and release. At the time of the settlement the defendant company had no actual notice or knowledge that the summons had been issued.

The contention of the attorney is based upon Acts 1899, chapter 243, which provides:

“Section 1. That attorneys of record who begin a suit in a court of record in this State shall have a lien upon the plaintiff’s right of action from the date of the filing of the suit.

“Sec. 2. That any attorney who is employed to prosecute a suit that has already been brought in any court of record in this State shall have a lien on the plaintiff’s right of action from the date of his employment in the case; provided, the record of the case will first be made to show such employment by notice

upon the rule docket of such court, or a written memorandum filed with the papers in the case, or by notice served upon the defendant in the case."

The claim of the attorney is that the issuance of the summons should, before its service, be treated as the "filing of the suit," so that any compromise thereafter made should be held to be subject to his lien on the cause of action. The circuit judge sustained this position, but his ruling was reversed by the court of civil appeals.

The act looks to the protection of two classes of attorneys: (a) Those of record who begin the particular suit; and (b) those who may be employed to prosecute a suit that has already been commenced.

In *Railroad v. Wells*, 104 Tenn., 706, 59 S. W., 1041, an action at law, it was said that the attorney, under the first section of the act, had a lien on the plaintiff's cause of action "from the commencement of the suit," though the present or any similar question was in no way involved.

By the provisions of the Code, sections 2813, 2754 (Shannon, sections 4518, 4445), all civil actions at law, in courts of record, are commenced by summons; but it is to be noted that the attorney's lien is not provided by the act in express terms to date from such commencement of the suit. Had that been the legislative intent, it could have been expressed by the use of that familiar, well-understood and exact phrase.

It is urged by the defendant company that it would work injustice were the statute to be construed to

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bind it to respond for plaintiff's attorney fee by reason of the compromise made before it had any kind of notice of the taking out of the summons.

As seen, the second section of the act has in contemplation notice to the defendant, either actual or constructive. The difficulty, in actions at law, lies in the words of the first section "shall have a lien . . . from the date of the filing of the suit." We think that the juster construction is that it was in the contemplation of the legislature that in such case there should be some sort of notice, actual or constructive, to the defendant in the action, and that there should be some record (the lien being only grantable to an attorney of record) or a file to which access might be had by a defendant for notice, so far as it may be constructive notice. When a summons issues from a court of law it goes into the hands of a sheriff or some one of his numerous deputies and does not come back for lodgment as a record in the office of the circuit court clerk until it shall have been served on the defendant or shall have failed of service—the fact to be indorsed by way of an official return. While this process so outstands, before actual service, it seems but simple justice to hold that a defendant may make settlement, where, as here, it had no knowledge of the fact that the process had been sued out, and that on doing so it is not answerable to the attorney of plaintiff for his fee for his services. *Northup v. Haywood*, 102 Minn., 307, 113 N. W., 701, 12 Ann. Cas., 341; *Florida, etc., R. Co.*, 104 Ga., 353, 30 S. E., 745.

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The alternative construction would leave open an avenue for the perpetration of frauds on defendants. Settlements made by them on the assumption that no suit had been brought manifestly would be on monetary bases different from those made with knowledge that the rights of an attorney must be reckoned with. Under the rule contended for by the attorney in the pending case, a defendant might be operated with a double burden without fault on his or its part.

Writ of *certiorari* denied.

Dry Goods Co. v. HILL.

DENISON-GHOLSON DRY GOODS Co. v. MRS. M. A. HILL.*

(Jackson. April Term, 1916.)

1. FRAUDS, STATUTE OF. Real property. Mortgage. Description.

A mortgage reciting the mortgagor's conveyance of "the following real estate," one house and lot and storehouse, bounded on the east by east alley, south by Third street, west by Broad street, north by Fourth street, containing the entire block between Third and Fourth streets, known in the plan of town as lots 53, 54, 55, and 56, and on default authorizing the mortgagee to sell the real estate at "Eaton, in Gibson county, Tennessee, at public sale," first advertising the sale by posters in three or more public places in Gibson county, one of which should be in the district in which the land lies, and one at the courthouse door in Trenton, Tennessee, or by advertising in some newspaper published in Gibson county," which did not mention the residence of the mortgagor or the mortgagee, did not contain a sufficient description of the real estate conveyed to comply with the statute of frauds. (*Post*, pp. 62-68.)

Cases cited and distinguished: Dobson v. Litton, 45 Tenn., 616; Johnson v. Kellogg, 54 Tenn., 262; Dougherty v. Chesnutt, 86 Tenn., 1; Wood v. Zeigler, 99 Tenn., 515; Railway v. Webster, 106 Tenn., 586.

2. EVIDENCE. Description of mortgaged premises. Parol evidence.

In such case no particular realty was indicated with sufficient certainty to permit of parol proof to correct or apply the attempted description, as a description of land applicable with equal exactness to any one of a number of tracts cannot be aided by parol evidence. (*Post*, pp. 62-68.)

3. BILLS AND NOTES. Ratification. Mortgaged security.

Where defendant, who had put some money in the business of her son-in-law, and must have known of his indebtedness, and

*As to sufficiency of description in land contract which gives right to select particular tract to be conveyed see note in 34 L. R. A. (N. S.), 147, and as to ratification of forged instrument, see note in 36 L. R. A. (N. S.), 1006.

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that he had made an assignment of his stock of goods, after the execution of a forged note for \$1,000 due January 1, 1912, purporting to be signed by her, executed a mortgage on realty "to secure the payment of one promissory note bearing this date and due January 1, 1912, for \$1,000," she thereby acknowledged the validity of the note and ratified its execution in her name. (*Post*, pp. 68-70.)

Case cited and distinguished: Railroad v. Roe, 118 Tenn., 601.

4. MORTGAGES. Requisites. Description of debt.

A mortgage of realty "to secure the payment of one promissory note bearing this date and due January 1, 1912, for \$1,000," sufficiently described the indebtedness intended to be secured; as literal exactness in describing the debt is not required, and a description correct so far as it goes and full enough to direct attention to the sources of full information is sufficient. (*Post*, pp. 70, 71.)

Cases cited and approved: Fitzpatrick v. School Com., 26 Tenn., 224; Stanford v. Andrews, 59 Tenn., 664; First Nat. Bank v. Tamble, 62 S. W., 308.

5. BILLS AND NOTES. Forgery. Estoppel. Statute.

Where defendant by her mortgage of realty to secure a certain described note thereby adopted and ratified the note, although it had been forged, and where after her ratification and the delivery of the mortgage and the note to the mortgagee the mortgagee released and turned over to her son-in-law a stock of goods which had been previously assigned for the mortgagee's benefit, an estoppel *in pais* arose against the defendant, precluding her from setting up forgery under section 23 of the Negotiable Instruments Act (Laws 1899, chapter 94). (*Post*, pp. 71, 72.)

Acts cited and construed: Acts 1899, ch. 94.

FROM GIBSON

Appeal from the Chancery Court of Gibson County.—CALIN P. McKINNEY, Judge.

Dry Goods Co. v. Hill.

WALKER & LANDRUM, for appellant.

TYREE & BRYANT, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

The bill in this case was filed by the complainant, an Illinois mercantile corporation, to recover judgment upon a note for \$1,000 alleged to have been executed in its favor by the defendant, and to enforce a mortgage upon certain real estate alleged to have been executed by defendant to secure the payment of said note.

The defendant filed a plea of *non est factum*, denying the execution of the note, and, answering, averred that she had signed the mortgage under duress, and further averred that the mortgage was invalid under the statute of frauds, for the reason that it did not contain a sufficient description of the property attempted to be conveyed.

Proof was taken and the bill was dismissed by the chancellor, from which decree the complainant has appealed. We will first consider the sufficiency of the description of the real estate contained in the mortgage.

The mortgage recites that M. A. Hill sells and conveys unto the Denison-Gholson Dry Goods Company the following real estate, to-wit:

“One house and lot and storehouse, bounded as follows: On the east by east alley, south by Third street, west by Broad street, north by Fourth street, contain-

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ing the entire block between Third and Fourth streets, known in the plan of town as lots 53, 54, 55, and 56."

Then follows the *habendum clause*, covenants, description of the debt and defeasance.

The mortgage next recites that:

If said indebtedness is not paid, etc., "the said Denison-Gholson Dry Goods Company is authorized and empowered to sell said real estate at Eaton, in Gibson county, Tennessee, at public sale, . . . first advertising said real estate for thirty days by written or printed posters posted up in three or more public places in the county of Gibson, one of which shall be the district in which the land lies, and one of which shall be at the courthouse door in Trenton, Tennessee, or by advertising for three consecutive weeks in some newspaper published in Gibson county, Tennessee."

The mortgage concludes with the date of its execution and the signature of M. A. Hill. It was acknowledged by Mrs. Hill before a notary public at Eaton, Gibson county, Tenn., on the date of its execution.

It will be observed that the mortgage does not mention the residence of the mortgagor the residence of the mortgagee. In describing the real estate it does not locate said real estate in any town, county, or State. It does not appear from the mortgage at what place it was executed. It was, however, acknowledged at Eaton, in Gibson county, Tenn., and the sale thereunder was authorized at Eaton, Gibson county, Tenn., and advertisement was provided by posters in three or more public places in Gibson coun-

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ty, one of which should be in the district in which the land was located, and one of which should be at the courthouse door at Trenton, Tenn., or else advertisement was to be made by publication in some newspaper published in Gibson county, Tenn.

We are of opinion that there is not a sufficient description of the real estate contained in this mortgage to comply with the statute of frauds, nor is any particular real estate indicated with sufficient certainty to permit of parol proof to correct or apply the attempted description.

In *Dobson v. Litton*, 5 Cold. (45 Tenn.), 616, a bill for specific performance of a contract for a sale of land was dismissed on account of defective description. The land there was described as:

“A certain tract of land, containing nine acres and sixty-six poles, near the junction of Broad street, Nashville, and the Hillsboro turnpike, Davidson county, Tennessee.”

The court said:

“Where an instrument is so drawn that upon its face it refers necessarily to some existing tract of land, and its terms can be applied to that one tract only, parol evidence may be employed to show where the tract so mentioned is located. But, where the description employed, is one that must necessarily apply with equal exactness to any one of an indefinite number of tracts, parol evidence is not admissible to show that the parties intended to designate a particular tract by the description.” *Dobson v. Litton*, *supra*.

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In *Johnson v. Kellogg*, 7 Heisk. (54 Tenn.), 262, specific performance was refused for a like reason. In that case the memorandum of sale was in these words:

"Received of W. E. Luter \$408.45, being his proportion of the first payment on the Bradley sand bank purchase. I having agreed to give him an interest of four-fifths of said purchase at cost, and hereby bind myself, when the purchase money shall have been all paid, to cause a deed of general warranty to be made to him and myself in like proportion, to-wit, Luter four-fifths, and myself one-fifth. March 7, 1857. S. Kellogg."

The court said the property was not located in any State or county, nor was the full name of Bradley, from whom the purchase was made, given, nor did it definitely appear what interest in the land was intended to be sold. Specific performance was therefore denied.

In *Dougherty v. Chesnut*, 86 Tenn., 1, 5 S. W., 444, a lease was held valid in which Henderson Fudge leased to one Wright for a period of twenty years "all the right to quarry marble on his farm known as Rose Hill." The instrument, however, showed on its face that both parties lived in Hawkins county, Tenn., from which the court inferred the lands lay in that county. Proof showed that the farm was known as Rose Hill to a very large number of people and so designated by them. The court cited *Dobson v. Litton*, supra, and sustained its action on the authority of that portion of the opinion in *Dobson v. Litton*, wherein it is said:

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“If the agreement itself shows that some particular tract was intended, then parol proof is admissible to show the location and boundaries of the tract mentioned, and to enable the court to find it.”

In *Wood v. Zeigler*, 99 Tenn., 515, 42 S. W., 447, the description of a tract of land known as the “Baldwin place” in a memorandum of sale was held insufficient under the statute of frauds. The paper contained no indication of the State or county in which the land was located. In the opinion in this case it was said of *Dougherty v. Chesnutt*, *supra*:

“That case has gone farther than perhaps any other reported in this State. We think it entirely sound, but we are not disposed to go beyond it.”

In *Railway v. Webster*, 106 Tenn., 586, 61 S. W., 1018, the court held, if a certain paper under consideration could be viewed as conveying an interest in land, it was void for insufficient description. The description was:

“The party of the first part is the owner of certain lands fronting 4,574 lineal feet on said second party’s line of railroad on mile 295 of Henderson division.”

It was pointed out that there was “no general description of a particular tract of land by which it is known and can be identified, but this description would equally apply to land on both sides of the railroad.” The rules laid down in *Dobson v. Litton*, *supra*, were again quoted and applied in this case.

Tested by these authorities, it is manifest that the description contained in the mortgage here under con-

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sideration does not meet the requirements of the statute of frauds, as that statute has been construed by this court.

This case cannot be assimilated to *Dougherty v. Chesnutt*, supra, because there is no indication of the residences of the parties here. Neither is there any reference to a place well known in any particular locality. If we could infer the county from anything in the mortgage, we would still be without a description which could be applied to any particular tract of land in the county. Moreover, as stated in *Wood v. Zeigler*, supra, *Dougherty v. Chesnutt* went very far, and we remain unwilling to go beyond that case.

We could not say that a power conferred upon a mortgagee or trustee to sell in a particular county indicated that the land was located in that county. Neither could we say that a provision for advertisement in a particular county indicated that the land was located in that county. We know as a matter of common experience that trust deeds are frequently executed upon lands in this State authorizing a sale upon default at cities in distant States. Likewise we know that advertisement of sale is frequently directed to be made in counties other than the county in which the mortgaged property lies.

The provision that the sale should be had at Eaton does not show that the land was in the town of Eaton. The circumstance that the mortgage was acknowledged at Eaton indicates nothing, for acknowledgments are taken wherever the grantor chooses to be.

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If we look to everything in the mortgage, however, and if we should be able to infer from the mortgage as a whole that the description therein contained referred to some town lot in Gibson county, Tenn., nevertheless the description would be fatally defective. It was said at the bar that there were a dozen considerable towns in Gibson county. The rule is that a description of land applicable with equal exactness to any one of an indefinite number of tracts cannot be aided by parol evidence.

The description of this town lot might be applied to lots in Trenton, Milan, Humboldt, Rutherford, Dyer, or to lots in any other of the several towns in Gibson county.

Such description was therefore not sufficient to pass title to the lots under the statute of frauds, and the chancellor correctly so held.

The question of the liability of Mrs. Hill upon the note, however, remains.

The weight of the proof in this case tends to show that this note was a forgery—at least that it was never signed by Mrs. Hill.

While this is true, nevertheless we are of opinion that her subsequent conduct amounted to a recognition of the note and an admission of liability thereon.

We are not impressed with her claim that she executed this mortgage under duress. The proof does not sustain this contention.

The mortgage, as we have heretofore shown, was made to the Denison-Gholson Dry Goods Company. It

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recites that it was made "to secure the payment of one promissory note bearing this date, and due January 1, 1912, for \$1,000." The note sued on is payable to the Denison-Gholson Dry Goods Company, bears even date with the mortgage, and was due January 1, 1912. It was negotiated to complainant by the son-in-law of defendant, a merchant at Eaton.

After reviewing all our cases on the question of ratification, the result of these authorities was thus stated by Mr. Chief Justice Beard:

"Where there is a full knowledge of the facts possessed by the principal, and he pursues thereafter a line of conduct which is consistent alone with the theory that the agent was acting for him, then the doctrine of ratification applies, and it is immaterial whether a ratification was contemplated or not." *Railroad v. Roe*, 118 Tenn., 601, 102 S. W., 343.

Mrs. Hill had put some money in the business of her son-in-law, and must have known of his indebtedness. They lived in the same house, and he had made an assignment of his stock of goods. The note and mortgage were executed to secure the indebtedness of this son-in-law to the complainant, and to procure the release of his goods assigned.

The mortgage recites that it was for the security of a \$1,000 note of even date, and payable January 1, 1912. Mrs. Hill thereby recognized and assumed liability for the payment of some note of said date and maturity. She not only adopted and ratified the execution of such note by this mortgage, but she under-

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took by the mortgage to secure and make certain the payment of the note. The mortgage was executed to the complainant, and naturally must have been intended to secure the note payable to the complainant of the date and maturity mentioned. Mrs. Hill was not a woman of large business affairs, and the circumstances of the case indicate that she could not have had in mind at the time this mortgage was made any other note than the one here sued upon by the complainant.

We think, therefore, irrespective of whether she herself signed the note sued on, by her reference thereto and her attempt to secure its payment in the mortgage, she acknowledged the validity of the note and ratified its execution in her name.

There was a sufficient reference to the note and a sufficient description thereof in this mortgage to indicate very clearly that the note in suit was the one referred to in the mortgage.

“It is not necessary to the validity of the mortgage that it should truly state or describe the debt which it is intended to secure. It may stand as security for the real equitable claim of the mortgagee if it appears to be genuine and honest, and is satisfactorily proved to be the debt which the parties, in fact, designed to secure by the mortgage. Thus a mortgage purporting on its face to secure and substantially describe a promissory note or bond, as the evidence of the debt to be secured, may be valid, although no such note or bond was ever executed or delivered, provided a real

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indebteness existed to the amount for which the note or bond was to have been given." 27 Cyc., 1056.

"Literal exactness in describing the debt is not required. It is sufficient if the description is correct so far as it goes and full enough to direct attention to the sources of correct and full information, and the language used is not liable to deceive or mislead as to the nature of the amount." Jones on Mortgages (2d Ed.) section 70.

See, also, *Fitzpatrick v. School Commissioners*, 7 Humph., 224, 46 Am. Dec., 76; *Stanford v. Andrews*, 12 Heisk., 664; *First National Bank v. Tamble*, 62 S. W., 308.

The indebtedness intended to be secured by this mortgage was sufficiently identified. The land intended to be conveyed, however, was not sufficiently described and does not pass. While the mortgage therefore is not effective as a conveyance of land, it is effective as a written admission of liability on the note.

We do not find it necessary to discuss the question as to whether or not a forgery is capable of ratification in Tennessee since the negotiable instruments statute. Aside from the question of ratification, the defendant, Mrs. Hill, is estopped to deny the validity of this note. It appears that after her recognition thereof in the mortgage and the delivery of the mortgage and the note to the complainant, the complainant released and turned over to the son-in-law his stock of goods, which which had previously been assigned in trust for complainant's benefit. Accordingly an estoppel *in pais*

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arises against Mrs. Hill, and she is "precluded" from setting up the forgery under section 23 of the Negotiable Instruments Act (chapter 94, Acts of 1899).

The result is that we affirm the decree of the chancellor in so far as he held the mortgage invalid. His decree with reference to the liability of defendant on the note must, however, be reversed, and decree entered against her here for the amount of the note and interest. The costs of the case will be divided between the parties.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION

KNOXVILLE, SEPTEMBER TERM, 1915.

JAMES BLACK *v.* MAMIE MOREE.*

(*Knoxville*. September Term, 1915.)

1. **HIGHWAYS.** Frightening mule. Action against automobile owner. Instruction. Statute.

In an action against an automobile owner for injuries to plaintiff on a highway, where the court charged that, if defendant failed to comply with Acts 1905, chapter 172, section 1, requiring the registration of automobiles, his conduct was negligence *per se*, and that, if an injury resulted to plaintiff by reason of such negligence and the wrongful act of defendant in violating the statute, the latter was liable for damages, also that, if he had the machine registered, he had a right to operate it, but, if it was not registered, he was liable for damages caused directly or proximately by its being operated along the public highway, such instruction was erroneous as leading the jury to conclude that defendant was liable if the mule drawing plaintiff's buggy took fright at the automobile, injury resulting consequently at a time when the automobile was on the public highway and not registered in defendant's name,

On the registration of automobiles see note in 1 L. R. A. (N. S.), 215.

On the duty and liability of operator of automobile with respect to horses encountered on the highway see notes in 1 L. R. A. (N. S.), 223, 224; 14 L. R. A. (N. S.), 251; 48 L. R. A. (N. S.), 946.

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whether the defendant was or was not negligent in the management of the automobile under the common law or sections 3 and 4 of the act. (*Post*, pp. 75-81.)

Acts cited and construed: Acts 1905, ch. 173, sec. 1.

2. HIGHWAYS. Frightening mule. Liability of automobile owner. Statute.

Where defendant's automobile was not registered as required by Acts 1905, chapter 173, when he operated it on the highway, and his failure to register it had no connection with and in no way caused the frightening of plaintiff's mule, which tipped over her buggy and injured her, defendant's failure to register his car alone, without negligence in its operation, did not render him liable to plaintiff; as the statute discloses no purpose to make failure to comply with its first section, requiring registration, the ground of liability of the owner of an automobile for any further sum than the fine of \$25 to \$100 prescribed by section 6. (*Post*, pp. 81-91.)

Cases cited and approved: *Chase v. Railroad*, 208 Mass., 137; *Dean v. Boston Elev. R. Co.*, 217 Mass., 495; *Gould v. Elder*, 219 Mass., 396; *Bourne v. Whitman*, 209 Mass., 155; *Hughes v. Atlanta Steel Co.*, 136 Ga., 511; *Shaw v. Thielbahr*, 82 N. J. Law, 23; *Birmingham R. R. Light & Power Co. v. Aetna Accident & L. Co.*, 184 Ala., 601; *Railroad v. Kelley*, 91 Tenn., 699; *Postal Tel. Co. v. opfl*, 93 Tenn., 369; *Railroad v. Pugh*, 97 Tenn., 625; *Chattanooga L. & P. Co. v. Hodges*, 109 Tenn., 331; *Adams v. Inn. Co.*, 117 Tenn., 470; *Vaulx v. Railroad*, 120 Tenn., 316.

Case cited and distinguished: *Dudley v. St. Ry. Co.*, 202 Mass., 443; *Feely v. Melrose*, 205 Mass., 329; *Armstead v. Lounsberry*, 129 Minn., 34; *Atlantic C. L. Co. v. Wier*, 63 Fla., 64; *Hemming v. New Haven*, 82 Conn., 661; *Lindsav v. Cecchi*, 3 Boyce (Del.), 138; *Weeks v. McNulty*, 101 Tenn., 495; *Demming v. Merchants' Cotton Press, etc., Co.*, 90 Tenn., 306.

FROM COCKE

Black v. Moree.

Appeal from the Circuit Court of Cocke County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—G. McHENDERSON, Judge.

MAYNARD & LEE and J. R. PENLAND, for plaintiff.

H. N. CATE and W. D. MCSWEEN, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

From a judgment for the sum of \$750 against him and in favor of Mamie Moree, Black appealed to the court of civil appeals, where the judgment was affirmed, and he has brought the record before this court for review by his petition for *certiorari* and assignments of error. The action was for damages, and was tried before a jury in the circuit court. The right to recover was predicated on divers grounds indicated by the general statement hereinafter made as to facts which plaintiff's evidence tends to establish. The injury for which recovery was sought resulted as will appear from the following excerpt from plaintiff's testimony:

"On Sunday afternoon, August 18, 1912, I was injured by being thrown from an overturned buggy. The animal drawing the buggy became frightened at an automobile which was being driven by the defendant, James Black. I did not know at the time he was running the car, but have since learned that he was. The injury occurred in the public road between Piedmont and New Market, Jefferson county, Tenn., and about two miles from New Market. I live in Knoxville, Tenn., and had come up from Knoxville Saturday to

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Piedmont to visit my grandmother, and two girls named Davis came up with me. On Sunday afternoon about four o'clock we were starting to New Market to take the train for Knoxville. When about two miles out from New Market the buggy in which I was being driven met the automobile. Coy Thompson was driving the buggy. The buggy was drawn by a mule."

Plaintiff then proceeds to relate her version of the details of the conduct of defendant, and following her evidence is that of other witnesses tending to show that the proximate cause of her injury was the negligent conduct of the defendant in the operation of the automobile. She introduced evidence tending to show the character of the injuries she claims to have sustained. All of the foregoing of her evidence was disputed by evidence introduced on behalf of the defendant, but she introduced one matter of evidence the truth of which the defendant did not deny, and it was that on the occasion in question the defendant, Black, was the owner of the automobile; that the automobile had been registered according to the requirements of the first paragraph of the first section of chapter 173, Acts of 1905, but had not been registered by defendant, Black, when he became the owner of it, as was required by the second paragraph of the first section of that act. (A copy of the act is set out on the margin of this opinion.) ¹

¹Chapter 173.

Senate Bill No. 246.

"An act to require owners of automobiles to register and number the same; to regulate the operation thereof; to provide for the recovery of damages for injuries caused by the unlawful running

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The defendant by his evidence showed, and this fact is not in dispute, that at the time he bought the car he paid the dealers from whom he purchased the fees necessary to a full compliance with both the first and the second paragraphs of the first section of the act of 1905, and requested one of these dealers to attend to the matter of having the car registered in the name of the defendant, as required by the act, and that defendant thought such registration had been accomplished until after the occasion in question. Defendant also introduced evidence tending to show that his management of the automobile on that occasion was not negligent under the common law, and that his failure to comply with the act of 1905, in so far as there was a

thereof; and to fix the penalty for the violation of the provisions of this act.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that before any owner of any automobile, locomobile, motorcycle, or any other vehicle of like character, other than street railway cars hereinafter termed 'automobile,' used for the purpose of transporting or conveying persons or freight, or for any other purpose, whether such automobile is propelled by steam, gasoline, or electricity, or any other mechanical power, shall operate or permit to be operated any automobile upon any street, road, highway, or any other public thoroughfare, such owner shall register such automobile with the secretary of State, giving the motive power, and make of the same, together with the name and residence address of such owner, and shall, upon the payment of a fee of two (\$2) dollars, receive from the secretary of State a certificate showing such registration, which certificate shall be numbered as issued in consecutive order, beginning with '100,' and shall thereafter, upon the payment of a fee of one (\$1) dollar, register said certificate with the county court clerk of the county in which such owner may reside.

"Whenever the ownership of such automobile shall become changed, by sale or otherwise, the purchaser thereof shall be required to notify the secretary of State of such transfer and receive a certificate in his name, for which he shall pay a fee of one (\$1) dollar, and he shall be required to register such certificate with the county court clerk of the county in which he resides, and pay therefor a fee of fifty (50) cents.

"Sec. 2. Be it further enacted, that a number in Arabic numerals of not less than three inches in height and one and one-half inches

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failure to comply with it, did not cause the overturning of the buggy, or in any degree contribute as a cause of that event, and that in his management of the car on the occasion in question he observed all the requirements of sections 3 and 4 of the act of 1905; that his failure to observe the requirements of the second paragraph of the first section of that act had no causal connection whatsoever with the injury. He also introduced evidence tending to show that plaintiff was not, in fact, injured by the overturning of the buggy, but that she jumped clear of the vehicle, and alighted without injury. The material facts being thus in conflict, his honor the trial judge, in his general charge to the jury, incorporated therein both paragraphs of section 1, chapter 173, Acts of 1905, and with respect thereto said:

in width, corresponding to that assigned to such automobile by the secretary of State in the certificate by him issued, as hereinbefore provided for, shall be displayed in a conspicuous manner at both the front and rear of such automobile, which said number shall be plainly written, printed, stamped, or otherwise set out upon a durable and substantial plate of the size of not less than four inches in height and seven inches in length, and to be provided by the owner of such automobile. In order to prevent confusion in numbers, no municipality shall require the owner of any automobile to place thereon any other or different number than that required in this section, and such owner shall not exhibit or permit to be attached to such automobile any other or different number than that provided for in said certificate.

"Sec. 3. Be it further enacted, that no automobile shall be run or driven upon any road, street, highway, or other public thoroughfare at a rate of speed in excess of twenty miles per hour: Provided, that any municipality shall have the authority to prescribe a lower maximum rate of speed within its corporate limits.

"Sec. 4. Be it further enacted, that whenever it shall appear that any horse or horses, driven or ridden by any person or persons, upon any street, road, highway, or other public thoroughfare, is about to become frightened by the approach of any automobile from an opposite direction, it shall be the duty of such person driving such automobile to bring the same to a full stop until such horse or horses shall have passed; and upon approaching any horse or horses from the rear it shall be the duty of the driver of any auto-

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"Now, it is insisted, gentlemen of the jury, in the first place, that the defendant failed to comply with that statute. I instruct you, gentlemen of the jury, that if you find the plaintiff is correct in this insistence, and that the defendant did operate the machine along the public highways without complying with the requirements of the first section of this act, that such conduct on his part would be negligence *per se*, and that if an injury resulted to plaintiff by reason of such negligence, and the wrongful act of the defendant in violating that statute, that he would be liable for some damages; but how these facts are, you must determine for yourselves from the proof in the case."

And on the same subject, in another part of the charge, the judge said:

mobile to slow down his rate of speed and make known his approach to such person or persons driving or riding such horse or horses, by ringing a bell or sounding a horn, and should such horse or horses appear to be frightened to stop such automobile for a time sufficient for such person or persons to alight, if desired, and take hold of such horse or horses, or otherwise control the same.

"Sec. 5. Be it further enacted, that whenever any suit for damages is brought in any court of competent jurisdiction for injuries to person or property caused by the running of any automobile in willful violation of the provisions of this act, there shall be a lien upon such automobile for the satisfaction of such recovery as the court may award whether, at the time of the injury, such automobile was driven by the owner thereof or by his chauffeur, agent, employee, servant, or any other person using the same by loan, hire, or otherwise.

"Sec. 6. Be it further enacted, that a failure on the part of any person or persons to observe and comply with the provisions of this act shall be deemed a misdemeanor, punishable by a fine of not less than twenty-five nor more than one hundred dollars.

"Sec. 7. Be it further enacted, that this act take effect thirty days after the date of its passage, the public welfare requiring it.

"Passed March 27, 1905.

"E. RICE.

"Speaker of the Senate.

"J. J. BEAN,

"Speaker pro tem. of the House of Representatives.

"Approved April 4, 1905.

"John I. Cox, Governor."

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“If he had the machine registered, he had a right to operate it, but if it was not registered, then he would be liable for any damages that were caused directly or proximately by the machine being operated along the public highway.”

After the conclusion of the general charge of the court one of defendant's counsel, conceiving, no doubt, that the above-quoted portion of the general charge was calculated to mislead the jury, sought to have the court cure it, and for that purpose requested the court to charge the jury as follows:

“If you should find that the defendant's car had not been registered as required by Acts of 1905, chapter 173, and should further find that this failure to register same had no connection with and in no way caused the accident in which she was injured, then this failure to so register it alone would not justify a verdict for plaintiff.”

The court refused to give the special charge, assigning as a reason that he had already sufficiently covered the proposition in the general charge.

The foregoing action of the court was assigned as ground for a new trial in the motion of defendant therefor. The court overruled this motion, and in so doing said:

“The court is of opinion and doth find that by a clear preponderance of the evidence the automobile, at the time the injury complained of occurred, was being operated at a less rate of speed than twenty miles an hour, and that as soon as it was apparent that the mule

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driven by plaintiff's companion was about to become frightened, the automobile was brought to a full stop. In other words, the court finds from a clear preponderance of the evidence that the defendant fully complied with the requirements of sections 3 and 4 of Acts of 1905, chapter 173, and that there was no common-law liability under the second and third counts of the declaration, and that the only basis for liability in this case is the failure of the defendant to comply with section 1 of said Acts of 1905, chapter 173, with reference to the registration of his automobile, and that because of his failure to comply with section 1 of said act he incurred absolute liability for the injury to plaintiff in this cause, and for this reason the motion for a new trial is overruled; but I would not be satisfied with the verdict, and would set it aside without hesitation, if the car had been properly registered at the time of the accident, as is prescribed by Acts of 1905, chapter 173."

It is our opinion that the defendant's right to a fair and impartial trial was prejudiced by the action of the court in charging the jury, as shown by the foregoing excerpts, and in refusing the special charge set out *supra*. By the charge as given we think the jury were led to conclude that defendant was liable if the mule took fright at the automobile, and injury resulted as a consequence of the fright, at a time when the automobile was on the public highway, and not registered in the name of the defendant, whether defendant was

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negligent or not negligent in the management of the automobile, according to the requirements of the common law, or the provisions of sections 3 and 4 of the Acts of 1905. The special charge was a correct statement of the law. The failure of defendant to register the car did not augment any injury plaintiff may have sustained. No evidence tends to show that the unseemly conduct of the mule was in the least degree influenced by nonregistration. Registration would not have prevented the automobile from being on the highway on the occasion in question, under the control of the defendant, nor would registration have increased or diminished the care with which it was handled. The automobile was, as already shown, registered under the first paragraph of section 1 of the act, and defendant believed it was also registered under the second paragraph of the act in his name; so under these circumstances there was in his mind every incentive to careful operation of the car which actual registration would have produced. It is therefore clear that the failure to register was entirely outside of and apart from the sequence of events which led up to and culminated in the injury. For aught we know to the contrary, the jury may have entertained the same views on the question of negligence which the trial judge expressed in overruling the motion for a new trial, and yet the jury no doubt felt impelled by the excerpts from the charge to find in favor of liability.

To sustain the action of the trial judge in respect of his charge plaintiff relies on a line of Massachusetts

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cases, the leading one of which is *Dudley v. Northampton St. Ry. Co.*, 202 Mass., 443, 89 N. E., 25, 23 L. R. A. (N. S.), 561. The doctrine of that case was followed in *Feeley v. Melrose*, 205 Mass., 329, 91 N. E., 306, 27 L. R. A. (N. S.), 1156, 137 Am. St. Rep., 445; *Chase v. New York C. & H. R. R. Co.*, 208 Mass., 137, 94 N. E., 377; *Dean v. Boston Elev. R. Co.*, 217 Mass., 495, 105 N. E., 616; *Gould v. Elder*, 219 Mass., 396, 107 N. E., 59. But in *Bourne v. Whitman*, 209 Mass., 155, 95 N. E., 404, 35 L. R. A. (N. S.), 707, the Massachusetts court, referring to the doctrine of *Dudley v. Northampton St. Ry. Co.*, supra, said:

“Some of us were disinclined to lay down the law so broadly, and the opinion of the court was not unanimous; but the doctrine has been repeatedly reaffirmed, and is now the established law of the commonwealth.”

The court then cited *Feeley v. Melrose* and *Chase v. New York C. R. R. Co.*, supra, and, after some further observations, said the court:

“We are of opinion that the law of these last cases should not be extended to the provision of the statute requiring every operator to have a personal license to operate the car. The jury should have been instructed that the defendant's failure to have a license was only evidence of his negligence as to the management of the car.”

The doctrine of the Massachusetts cases is that under the statute in that State (not materially different from our own) the legislature intended to outlaw unregistered machines, and to give them, as persons

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wrongfully using the highways, no other right than that of being exempt from reckless, wanton, or willful injury. "They were to be no more travelers than is a runaway horse." The user of such a machine under those cases is treated, not as a traveler on the highway, but as a violator of the law made for the protection of travelers. But the doctrine of these cases has not been generally accepted by other courts of last resort, and we are persuaded that the Massachusetts doctrine is not supported by the weight of reason or authority. It is expressly disapproved in *Armstead v. Lounsberry*, 129 Minn., 34, 151 N. W., 542, L. R. A. (1915D), 628, 9 N. C. C. A., 828. In that case it was said:

"Plaintiff's violation of the law, in order to affect his case, must, like any other act, 'be a proximate cause, in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action.' 1 Shearm. & Redf. Neg. section 94. A collateral unlawful act not contributing to the injury will not bar a recovery. *Hughes v. Atlanta Steel Co.*, 136 Ga., 511, 71 S. E., 728, 36 L. R. A. (N. S.), 547, Ann. Cas., 1912C, 394, 1 N. C. C. A., 429. Plaintiff's violation of law in this case is of this collateral character. There was no relation of cause and effect between the unlawful act and the collision. The registration of plaintiff's automobile was of no consequence to defendant. The law providing for such registration was not for the prevention of collisions, and had no tendency to prevent collisions. There is no pretense that the

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registration of plaintiff's automobile would have had any tendency to prevent this collision. Plaintiff's failure to obey the law in no way contributed to his injury and could not bar his right of recovery."

After discussing the Massachusetts cases, the opinion of the Minnesota court adds:

"It appears to us the weight of argument, as well as the weight of authority, is against the rule of the Massachusetts cases and in accordance with the rule we have above laid down."

See, also, *Atlantic C. L. Co. v. Wier*, 63 Fla., 64, 69, 58 South., 641, 41 L. R. A. (N. S.), 308, Ann. Cas., 1914A, 126 where in the opinion of the court it is said:

"The drivers of vehicles on public highways are required by law to exercise due care and should have the vehicles in control. . . . A failure of either party in the exercise of due care, under the circumstances as they may appear, is negligence, and the consequences of negligence are governed by applicable provisions and principles of law. . . . If an unlawful act of an injured party has no causal relation to his injury that proximately results from another's mere negligence, a recovery may be had under the principles of the common law, if the plaintiff is not guilty of contributory negligence."

In *Hemming v. New Haven*, 82 Conn., 661, 74 Atl. 892, 25 L. R. A. (N. S.), 734, 18 Ann. Cas., 240, it is said:

"In doing an unlawful act a person does not necessarily put himself outside the protection of the law.

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He is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a lawbreaker. . . . The registration of the plaintiff's machine was of no consequence to the defendant. His failure to register and display his number in no way contributed to cause the injury. The accident would have happened if the law in this respect had been fully observed. The plaintiff's unlawful act was not the act of using the street, but in making a lawful use of it without having his automobile registered and marked as required by law."

Lindsay v. Cecchi, 3 Boyce (Del.), 138, 80 Atl., 523, 35 L. R. A. (N. S.), 699, was an action for damages for personal injuries sustained by reason of being run into and knocked down by an automobile operated by one of the defendants. The Delaware statute provides:

"That no person shall operate a motor vehicle upon the public streets, roads, turnpikes, or highways of this State unless he had first obtained from the secretary of State a license."

The trial court charged the jury that the violation of this statute was negligence *per se*, "that is, an act of negligence itself, and renders the wrongdoer liable for an injury resulting from such misconduct." The supreme court of Delaware, in disposing of the case, said:

"The general principle is well settled that any person violating a law prohibiting the act in connection with which injury results to another person is guilty of negligence *per se*; but in this State and elsewhere the courts have very uniformly held that there must be

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a causal relation between the violation of a statute and the injury to render the defendant liable. The court below in its charge to the jury did not qualify or explain that the failure to procure a license must have contributed to the accident. . . . It is evident from a careful reading of the testimony found in the record in this case that there was no possibility of causal connection between the absence of the license and the injury to the plaintiff. Possession of a license did not insure or even tend to show skill on the part of the operator; therefore the absence of a license did not show the contrary. Whether she had a license or not was therefore clearly immaterial to the question of her negligence towards the plaintiff, and the jury should have been so instructed."

Supporting the view that failure to register is not a link in the sequence of causation where liability is predicated on the mere use of an unregistered automobile on the highway, in addition to those already cited, are the following cases: *Shaw v. Thielbahr*, 82 N. J. Law, 23, 81 Atl., 497; *Birmingham R. R. Light & Power Co. v. Aetna Accident & L. Co.*, 184 Ala., 601, 64 South., 44.

In one of our cases where liability was predicated on the breach of a municipal ordinance it was said:

"The principle is recognized in all the cases that a liability cannot be predicated alone upon the breach of an ordinance, but it must affirmatively appear that the injury sustained resulted proximately from said breach. . . . In other words, it is not enough that negli-

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gence exists, or that the ordinance was violated, unless it proximately caused the injury." *Weeks v. McNulty*, 101 Tenn. (17 Pick.), 495, 48 S. W., 809, 43 L. R. A., 185, 70 Am. St. Rep., 693.

"The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter." *Demming v. Merchants' Cotton Press, etc., Co.*, 90 Tenn. (6 Pick.), 306-353, 17 S. W., 89, 13 L. R. A., 518.

See, also, *Railroad v. Kelley*, 91 Tenn. (7 Pick.), 699, 20 S. W., 314; *Postal Telegraph Co. v. Zopfi*, 93 Tenn. (9 Pick.), 369, 24 S. W., 633; *Railroad v. Pugh*, 97 Tenn. (13 Pick.), 625, 37 S. W., 555; *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. (1 Cates), 331, 70 S. W., 616, 60 L. R. A., 459, 97 Am. St. Rep., 844; *Adams v. Inn Co.*, 117 Tenn. (9 Cates), 470-477, 101 S. W., 428, and cases cited.

Our act of 1905 (chapter 173) discloses no purpose to make a failure to comply with its first section a ground of liability by the owner of an automobile for any further sum than a fine of not less than \$25 nor more than \$100. Section 6 of the act provides for this fine, and makes the failure to observe and comply with the provisions of the act a misdemeanor. Section 5 provides for a lien on the automobile to satisfy such recovery as the court may award for injuries to person or property caused by the running of any automo-

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bile in willful violation of the provisions of the act. The provisions referred to are set out in sections 3 and 4. It is manifest that injuries to person or property could not be caused by running in violation of any other section or sections. No other section undertakes to regulate the speed and the precautions to be observed while running; and, though a running of the automobile might occur while its owner was in default in respect of the observance of sections 1 and 2, it is manifest, as before observed, that such running in violation of those sections could not by any possibility cause an injury to person or property. In a text-book of acknowledged merit it is said:

“It would seem that ordinarily at least the failure to register could have no effect either upon the question of liability for injuring another, or upon the right to recover for injury, as it is difficult to perceive how it could be a proximate cause of an injury.” Elliott on Roads & Streets (3d Ed.), vol. 2, section 1115.

The construction of our statute should be made with the principle just expressed in view. The penalties denounced by section 6 are expressed in plain terms, and it is not for the judicial department, by construction, to give section 5 a penal effect when its obvious purpose is remedial only. If the framers of the statute had intended to add any penalties than those expressed in section 6, they would, no doubt, have expressed such purpose in words of clear import. The penalties declared in section 6 were deemed sufficient to induce a compliance with sections 1 and 2. A construction giv-

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ing section 5 a penal effect would produce not only absurd, but unjust, results, such as its framers did not intend to flow from its passage. The general object of the act is the regulation of the operation of automobiles on public highways. Its title expresses this object. The provisions in its body are intended to effectuate such purpose. Its passage is a legislative recognition of the right of travelers to use automobiles as vehicles of transportation. The right, however, in the interest of the safety of other users of the highway, was operated by the act with the duties imposed by sections 3 and 4. On the other hand, sections 1 and 2 are remedial in character. They are intended to promote discovery of the responsible owner of an automobile where its operation on the highway has caused an injury to person or to property. Pertinent to the character of sections 1 and 2 is the following observation in one of the opinions of the supreme court of New Jersey:

“The fact that the plaintiff was licensed at the time of the accident was not an essential part of his case, or even relevant to the issue as framed, since the possession of such a license had no tendency to avert collisions, as do brakes, signal trumpets, and lighted lamps at night. . . . What is gained by the display of a license number is not the avoidance of collisions, but the more ready identification of a machine and its responsible owner. To the argument that the absence of this means of identification had a tendency to make the plaintiff less careful the answer is that such a con-

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sideration is too remote to be relevant in the legal meaning of that term which is derived, not by the strict processes of logic, but of the exigencies of trial by jury."

In the present case the motion for a new trial should have been sustained: First, because the trial judge had misdirected the jury; and, second, because he was dissatisfied with the verdict. *Vaulx v. Railroad*, 120 Tenn. (12 Cates), 316, 108 S. W., 1142.

The judgment of the court of civil appeals is reversed, and the cause remanded for a new trial.

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W. A. TODD v. CINCINNATI, N. O. & T. P. RY. CO.

(*Knoxville*. September Term, 1915.)

1. **RAILROADS. Accidents at crossings. Proximate cause. Obstruction of crossing.**

The obstruction of a highway crossing by cars stopped across it is not the proximate cause of injury to a person who was struck by moving cars on another track while he was waiting to cross. (*Post*, pp. 98, 99.)

Cases cited and approved: Alabama, etc., R. Co. v. Cox, 106 Miss., 33; Du Boise v. R. R. Co., 88 Hun, 10; Jackson v. Nashville, etc., R. Co., 81 Tenn., 491; Beopple v. Railroad, 104 Tenn., 420; Selleck v. Lake Shore, etc., R. Co., 58 Mich., 195.

Case cited and distinguished: Butterfield v. Forrester, 11 East., 69.

2. **RAILROADS. Accidents. Statute. Switching.**

The statutes prescribing the precautions to be observed in the operation of trains do not apply to movements of cars during switching operations in railroad yards. (*Post*, pp. 99, 100.)

Case cited and approved: Railroad v. Pugh, 95 Tenn., 419.

3. **RAILROADS. Accidents at crossings. Care of traveler. Continuing duty.**

The duty of a pedestrian approaching a railroad grade crossing to look and listen continues so long as he is on the track. (*Post*, p. 100.)

Case cited and distinguished: Patton v. Railroad, 59 Tenn., 373.

4. **RAILROADS. Accidents at crossings. Care of traveler. Sight and hearing.**

Where either the sense of sight or of hearing is not available on approaching a railroad crossing, the obligation of a pedestrian to use the other sense is stronger. (*Post*, p. 101.)

Case cited and distinguished: Railroad v. Satterwhite, 112 Tenn., 185.

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5. NEGLIGENCE. Contributory negligence. Last clear chance.

The rule that contributory negligence of the plaintiff will not bar recovery where defendant could have avoided the accident thereafter generally applies. In relation to successive acts of the parties, only to conscious misconduct of the defendant after discovering plaintiff's peril, not to failure to exercise due care to discovering such peril. (*Post*, pp. 101-105.)

Cases cited and approved: *Davies v. Mann*, 10 M. & W. 546; *Tuff v. Warman*, 2 C. B. (N. S.), 740; *Radley v. London, etc., R. Co.*, 1 App. Cas., 759; *Dunworth v. Grand Trunk, etc., R. Co.*, 127 Fed., 307; *Chunn v. City, etc., R. Co.*, 207 U. S., 302. *Railroad v. Williford*, 115 Tenn., 122; *Railroad v. Roe*, 113 Tenn., 610.

Case cited and distinguished: *Grigsby v. Bratton*, 128 Tenn., 597.

6. NEGLIGENCE. Contributory negligence. Last clear chance. Simultaneous acts.

Where the misconduct or negligence of plaintiff is simultaneous with that of defendant, or the act of plaintiff has not terminated as a causal factor, there can be no recovery under the doctrine of last clear chance. (*Post*, pp. 105-108.)

Cases cited and approved: *Teakle v. San Pedro, etc. R. Co.*, 32 Utah, 276; *Bourrett v. Chicago, etc., R. Co.*, 152 Iowa, 579; *Railway v. Haynes*, 112 Tenn., 736; *Inland, etc., Co. v. Tolson*, 139 U. S., 551.

7. NEGLIGENCE. Contributory negligence. Last clear chance. Dangerous occupation.

On principles of public policy, one who is engaged in a business hazardous to the public, such as operating a dangerous instrumentality, is required to be constantly on the lookout for others, and is liable for his negligent failure to keep such lookout, even to one who was negligent in subjecting himself to the danger. (*Post*, pp. 105-108.)

8. RAILROADS. Accidents at crossings. Contributory negligence. Last clear chance. Gross negligence.

An adult pedestrian in full possession of his faculties who desired to cross a four-track railroad, the last track of which

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was blocked by stationary cars, and who stopped on the third track and engaged for several minutes in conversation with another without at any time looking up the track to ascertain if another train was approaching, was guilty of such gross negligence as to preclude his recovery, even though the railroad employees were bound to anticipate that a person might be there and negligently failed to perform their duty to look out, which negligence on their part would render the company liable for injuries to one whose contributory negligence was not gross. (*Post*, pp. 108-113.)

Cases cited and approved: *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S., 551; *Railway Co. v. Ives*, 144 U. S., 408; *St. Louis, etc., R. Co. v. Schumacher*, 152 U. S., 77; *Ill. Cent. R. Co. v. Ackerman*, 144 Fed., 959; *Chunn v. City & Suburban Ry. Co.*, 207 U. S., 302; *Rider v. Syracuse Rapid Transit Co.*, 171 N. Y., 139; *Moore v. Phila., etc., R. Co.*, 108 Pa., 349; *Muscarro v. Railroad Co.*, 192 Pa. 8; *Atcheson, etc., R. Co. v. Withers*, 69 Kan., 620; *So. R. Co. v. Bailey*, 110 Va., 833; *Oliver Iowa Cent. R. Co.*, 122 Iowa, 222; *Buckley v. Flint, etc., R. Co.*, 119 Mich., 583; *Meinrenkin v. N. Y. Cent., etc., R. Co.*, 81 App. Div., 132.

Cases cited and distinguished: *Quinn v. Chicago, etc., R. Co.*, 162 Ind., 442; *Dunworth v. Grand Trunk, etc., R. Co.*, 127 Fed., 307; *Denver City Tramway Co. v. Cobb*, 164 Fed., 41; *Zirkle v. Railway Co.*, 67 Kan., 77.

9. RAILROADS. Accidents at crossings. Contributory negligence. Distraction of attention.

Where a pedestrian, desiring to cross a four-track railroad, stopped on the third track to wait until the cars obstructing the fourth track were removed, and was there struck by cars moving along the third track, the fact that he was watching a train approaching from the opposite direction on the second track does not relieve him from contributory negligence, since distraction of attention excuses failure to exercise the senses only when it renders their use impracticable. (*Post*, pp. 113-116.)

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Cases cited and approved: Piper v. C., M. & St. P. R. Co., 77 Wis., 247; Schneider v. C., M. & St. P. R. Co., 99 Wis., 386; Koester v. C. & M. W. R. Co., 106 Wis., 460; Railroad v. Dies, 98 Tenn., 655; Wilson v. Citizens' St. R. Co., 105 Tenn., 74; Middle Tenn. R. Co. v. McMillan, 184 S. W. —.

Case cited and distinguished: Guhl v. Whitcomb, 109 Wis., 69.

FROM SCOTT

Appeal from the Criminal and Law Court of Scott County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court. —XEN HICKS, Judge.

FOWLER & FOWLER and E. G. FOSTER, for appellant.

H. M. CARR, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is an action of damages for personal injuries sustained by Todd, the plaintiff below, by reason of his being struck by cars of defendant company at a public crossing.

The trial judge in the circuit court directed a verdict in favor of the defendant railway company, but on appeal the court of civil appeals held that there was sufficient evidence adduced by the plaintiff to take the case to the jury. The cause is before us for review on peti-

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tion for and grant of the writ of *certiorari*, and it has been argued at the bar of this court.

The accident occurred at Robbins, a small station on the main line of the defendant company, at a point where the highway crosses four tracks in the switch-yard of the defendant company. Because of the location of a brick plant at that station much switching of cars is required over these tracks at this point. A local freight train was engaged in switching operations in this yard on the day in question, and it appears that a drawhead had pulled out of a car, with result that a cut of cars was left standing over the highway on the westernmost or fourth track, and these cars had obstructed passage by pedestrians within the limits of the highway for a period of nearly thirty minutes. Todd, a man of about sixty years of age, on his way from the home of his son on the east side of the railroad to a barn on the west side, carrying a bag of corn, walked to the crossing, but he found it obstructed, and sat down on the steps of the depot building to await a clearance. While sitting there he says he heard the sounding of a locomotive whistle, and, thinking that the blockading cars were about to be pulled away, he started towards the crossing and passed over the first, second, and third tracks, and, putting the sack of corn down on the track, took his position on the end of the ties of the third track, where he stood engaged in conversation with another man, his face turned continuously for twenty minutes to the south. While the two men were thus standing near the yet obstructing

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cars, another freight train pulled into the station on the second track, approaching from the south, and Todd's attention was called to that train. While his back was turned in that direction, the engine of the first-named train, with a portion of the train of cars which had been detached from the blockading cut of cars, had been run northward to a switch and been switched from the fourth to the third track; the purpose being to take them to another switch point south of the highway and go again on the fourth track and draw the impeding cut of cars away towards the south. It may be inferred that this was due to the fact that the drawhead on the other end of the cut of cars made this necessary. Those cars on the third track proceeded under the control of the engine, but no brakeman was on the car next to the highway being approached to give warning, and it is not made to appear that Todd was seen standing in striking distance of the third track by the enginemen. The rear car thus backing from the north on the third track struck plaintiff on the right hip, throwing him to the ground and injuring him. Todd did not see or hear the approach of the engine and cars, but did not look in that direction at all, though the view was unobstructed for above 200 yards. He says:

"I never turned my head north once. After the train appeared in sight below the depot I was watching it come in from the south. When its engine moved up by me, I did not step over towards the other track.

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I had no occasion to step off; I was looking to the south."

Todd's companion, testifying in his behalf, says that, standing by plaintiff's side, he saw the train backing from the north, and ran out in front of the north-bound train on the second track. "I told Todd I believed that he was going to get hurt if he didn't get out. I ran out to save myself. He was looking at me when I started out." Todd stated that he did not hear this admonition, but he did not deny the last statement to the effect that he looked at his companion when the latter started out of the place of peril.

Plaintiff had lived at the station for years, and was conversant with the use of the tracks, two of which were main line tracks.

The primary insistence of plaintiff is that the defendant company was guilty of negligence in obstructing the highway for something like one-half hour which should be deemed to excuse him of any charge of contributory negligence. However, the obstruction of the highway, if to be deemed negligent at all in view of the pulling out of the drawhead (*Alabama, etc., R. Co. v. Cox*, 106 Miss., 33, 63 South., 334), was not a proximate cause of the plaintiff's injuries, but only one of the conditions that remotely gave occasion for the same arising. The principle underlying found illustration in the pioneer and leading case of *Butterfield v. Forrester*, 11 East, 60, 19 Eng. Rul. Cas., 189. There plaintiff, who was riding violently, rode against an obstruction in the highway placed there negligently by

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defendant. The trial judge directed the jury that, if a person riding with reasonable care could have seen and avoided the obstruction, defendant would not be liable. A rule was moved for on the authority of a passage in Buller's *Nisi Prius* to the effect:

"If a man lay logs of wood across a highway, though a person may, with care, ride safely by, yet, if by means thereof my horse stumble and fling me, I may bring action."

Lord Ellenborough, C. J., in refusing the motion, said:

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he did not use common and ordinary care to be in the right. . . . One person being in fault will not dispense with another's using ordinary care for himself."

In *Du Boise v. New York Cent. R. Co.*, 88 Hun, 10, 34 N. Y. Supp., 279, where it appeared that a traveler while waiting for a train to move off of a crossing was struck by a train on another track, it was held that the obstruction, though unlawful, was not the proximate cause of the injury. And see *Jackson v. Nashville, etc., R. Co.*, 13 Lea (81 Tenn.), 491, 49 Am. Rep., 663, *Beopple v. Railroad*, 104 Tenn., 420, 429, 58 S. W., 231, quoting *Selleck v. Lake Shore, etc., R. Co.*, 58 Mich., 195, 24 N. W., 774, and cases cited below.

Assuming throughout the further consideration that it was negligence on the part of the railway company to run the cars on the crossing and against the plain-

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tiff without warning or signals as to its approach, we have to deal with the counter contention as to plaintiff's contributory negligence. That he was negligent in standing in a place of danger for so long a time without looking about him in order to his own safety must be equally conceded; so that, nothing else appearing, plaintiff may not recover. The train causing the injury being engaged in switching operations in the yard of the company, the statute prescribing the precautions to be observed is not applicable, and the case is to be governed by common principles under a rule familiar to the profession in this State. *Railroad v. Pugh*, 95 Tenn., 419, 32 S. W., 311.

This court has laid down the common-law rules applicable in the case of *Patton v. Railroad*, 89 Tenn., 379, 15 S. W., 921, 12 L. R. A., 184, and there the duty of one going upon a railroad track to look out for his safety was indicated to be a continuing one by this language:

“The duty to look and listen when going upon a railway track is a continuing duty so long as one continues upon it, using it as a walkway. The duty of a person so situated to continue to look out for himself, in view of the consequences likely to result from inattention, are not less imperative than the duty of employees operating a train to look out for him. The statute not being applicable, the negligence of each (party) may appear equal, and in that case there can be no recovery.”

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Respecting the traveler's use of both the senses of sight and hearing in ordinary circumstances, the rule in this State is:

“A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing as well as of sight—and, if either sense cannot be rendered available, the obligation to use the other is stronger—to ascertain” the approach of trains before attempting to cross. *Railroad v. Satterwhite*, 112 Tenn., 185, 204, 79 S. W., 106, 111.

The chief contention of plaintiff, and the one followed by the court of civil appeals, is: Assuming that plaintiff was negligent in that he manifested indifference to the conditions of increasing danger that surrounded him, yet the defendant company would be liable because plaintiff and his perilous position could have been seen by the employees of the company operating the backing train had they been in the exercise of ordinary care, and that therefore it was in their power to prevent the accident, and their failure to do so should be deemed by the law the sole proximate cause of the injury.

The doctrine of the case of *Davies v. Mann*, 10 M. & W., 546, 6 Jur., 954, 19 Eng. Rul. Cas., 190, decided by the English Court of Exchequer in 1842, is invoked to sustain the ruling. That case is quite commonly referred to as “the donkey case,” and the donkey therein involved has been embalmed in the history of the law of negligence, his case having become a veritable storm center of disputation by courts and text-writers. The

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facts in that case were: Plaintiff's donkey, the fore feet of which he had fettered, and which he had negligently allowed to graze at large upon the highway, was run down and killed by defendant's servant, who was driving a wagon "at a smartish pace," or "to fast," along the highway. "It was proved that the driver of the wagon was some little distance behind the horses," whether on the wagon seat is not stated. Lord Abinger, C. J., held that:

"As the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."

Parke, B., concurring, added this observation:

"Were this not so, a man might justify the driving over goods left on the public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

It seems to us not improbable that much of the variance in views as to the soundness of that case may be attributed to the meager statement of its facts, and to the brevity of the opinions delivered by the court. It is not made clearly to appear whether the driver of the wagon saw the donkey in its hobbled condition ahead, or whether he merely could have seen it had he been in the exercise of ordinary care. The case was followed in the later cases, among others, those of *Tuff v. Warman*, 2 C. B. (N. S.), 740, 19 Eng. Rul. Cas., 194 (1857), and *Radley v. London, etc., R. Co.*, 1 App.

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Cas., 759 (1876), and it may be said that the courts of England have proceeded as if *Davies v. Mann* sustained more than the doctrine of discovered peril—that defendant is bound by what he might have discovered in the exercise of ordinary care.

The rule of *Davies v. Mann*, conceived of as substantially announcing that phase of doctrine, is championed by the leading English text-writer on the law of torts, Sir Frederick Pollock (Torts [9th Ed.], 473 *et seq.*), and by another English author, Mr. Bevens, in his work on Negligence (pages 150-152).

That case, when carried to that extent, is strongly combated by Judge Thompson (1 Thomp. Neg. [2d Ed.], section 231 *et seq.*), by Mr. Beach (Contributory Negligence [3d Ed.], 11 *et seq.*), and by Mr. Bishop (Noncontract Law, section 462, note 2). The decided and well-nigh overwhelming weight of the American adjudications is against *Davies v. Mann*, except as that case may be deemed to have announced the doctrine of discovered peril and the duty imposed on a defendant as to his acts after a consciousness thereof.

As now administered in the federal courts, it seems that the rule, except in exceptional cases later to be referred to, is settling down to a recognition of defendant's nonculpability unless in case where, aware of plaintiff's negligent exposure of himself to peril, the defendant omits reasonable care to avoid the injury. *Dunworth v. Grand Trunk, etc., R. Co.*, 127 Fed., 307, 62 C. C. A., 225; *Chunn v. City, etc., R. Co.*, 207 U. S., 302, 28 Sup. Ct., 63, 52 L. Ed., 219.

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It seems also that in cases other than such exceptional ones this is the conception of *Davies v. Mann* enforced by this court. *Railroad v. Williford*, 115 Tenn., 122, 88 S. W., 178; *Railroad v. Roe*, 118 Tenn., 610, 102 S. W., 343. The difficulty involved in the solution of liability in a given case is in determining the fact whether the two negligences, of plaintiff and of defendant, are concurrent to the moment of the injury; for, when this is the case, plaintiff's negligence ordinarily is not remote, and clearly contributes as a proximate cause, thereby disentitling him to recover. As said in our latest case of *Grigsby v. Bratton*, 128 Tenn., 597, 603, 163 S. W., 804, 806:

“Assuming that defendant was negligent, we are of opinion that plaintiff's negligence continued to operate concurrently at the moment of the accident in producing it; that there was no independent, self-supporting act of defendant that solely caused the injury, or so came into operation as to make plaintiff's negligence remote. . . .

“Where the plaintiff and defendant are thus guilty of acts of negligence which together constitute the proximate cause of the injury, then the negligence of plaintiff, however slight, bars a recovery.”

If during a period at or before the infliction of injury adequate for preventive action by defendant he had actual knowledge of plaintiff's danger and failed to exercise ordinary care to avoid it, all authority is to the effect that plaintiff may be awarded relief; for then the negligence of defendant takes the color of will-

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fulness. Passing beyond that point, the courts are in conflict, one line of decisions requiring actual knowledge on the part of defendant, and the other requiring merely such a fair opportunity to have actual knowledge of plaintiff's peril that a prudent man would have had it. In our view *Davies v. Mann*, as applied to its or equivalent facts, should be construed to relate, if to successive acts, then some conscious act of misconduct on the part of the defendant in succession.

Where the acts of misconduct or negligence on the part of plaintiff and defendant are not successive, but simultaneous, in such case, or the act of the plaintiff may not be conceived of as terminated as a causal factor, there should be no recovery. Ordinarily legal causation deals with the relation of act to result, as cause to effect, and is therefore the equivalent of actual causation. But this is not invariably true, since the law of contributory negligence proceeds upon principles of public policy, which policy may, on being brought into consideration, force a modification of the normal conception of causation, so that it is "with causal relation plus some restrictive principle of policy" that the courts have to deal. In other words, in certain attitudes the public is, so to speak, treated as a third party whose rights are to be reckoned with in the result to be declared—the award or nonaward of a recovery to a plaintiff. Society is not always unconcerned as to whether the conduct of its members shall reach the standard of due care erected by the law; and that standard may tend to be attained by the assist-

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ance to be given or refused by society's judicial functionaries.

It is on such considerations that cases composing an exceptional class have been determined. We refer to those instances where the defendant is engaged in a business hazardous to the public in certain aspects, such as that of operating dangerous instrumentalities, and where, therefore, the law imposes the duty on the defendant continuously to anticipate that some other (plaintiff) may negligently subject himself to a peril from defendant as a source; the latter having control of some instrumentality that has inherent potentiality of danger. Such a defendant is precedently, and continuously to the moment of injury, under the duty of lookout for the other, and his or its negligence in failing to discover the exposure of such a plaintiff and averting injury by the exercise of ordinary care is on grounds of policy considered to be proximate cause. The law in such case conceives of the negligence of the plaintiff as being remote; it may be in disregard of logic or of actual causation. It is assigned that *status* in the law's regard by reason of the policy of the law, though it may be that from the standpoint of actuality of cause the plaintiff's negligence is concurrent with the defendant's to the moment of injury. *Teakle v. San Pedro, etc., R. Co.*, 32 Utah, 276, 90 Pac., 402, 10 L. R. A. (N. S.), 486; opinion of Ladd, J., in *Bourrett v. Chicago, etc., R. Co.*, 152 Iowa, 579, 132 N. W., 973, 36 L. R. A. (N. S.), 964; Patterson's Railroad Accident Law, 55.

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Mr. Thompson, in his work on Negligence (1 Thomp. Neg. [2d Ed.], section 232), referring to the doctrine of the above-cited leading English cases, says in this connection:

"The doctrine can have no just application in any case, except where the person inflicting the injury was under the duty of exercising care to discover the exposed situation of the person receiving the injury. If this test is kept steadily in view, it will lead us out of many difficulties and prevent much confusion. The best illustration of the principle is found in the case of the engineer of a railway train on a railroad where there are grade crossings, or where the track runs along a public street or highway, and where consequently human beings or animals are liable to get on the track. The engineer is driving the instrument of danger forward, generally at a high rate of speed. He is the actor, and the person or animal on the track is passive; he is therefore under a continuous duty of watchfulness. . . . The sound principle then is that the defense of contributory negligence is not available where the defendant was guilty of a negligent act or omission subsequently to the time when he ought to have known that the negligence of the plaintiff or of the person injured had created a situation of peril."

Quite as common and yet a more apt illustration is that of a motorman of a street car bound to vigilance with regard to the safety of those travelers who are making use of the public street on which his car is operated, and in such case this court has held that actual

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discovery of plaintiff's peril is not necessary to convict the defendant company of negligence, but it is bound by what its motorman could have discovered in the exercise of ordinary care. *Railway v. Haynes*, 112 Tenn., 736, 81 S. W., 374. And see, generally, 2 Nellis on Street Railways (2d Ed.), section 462.

The supreme court of the United States applied the principle where a boat was approaching a wharf where passengers should have been expected to be standing. *Inland, etc., Co. v. Tolson*, 139 U. S., 551, 559, 11 Sup. Ct., 653, 35 L. Ed., 270.

However, notwithstanding what has just been said and the further fact that the plaintiff in the case under review at the time he was struck was in a highway, where the train employees must have anticipated persons might be, the principle is not decisive of the case in favor of the plaintiff. He was guilty of gross negligence; he knew that he could not cross over and continue his journey as a traveler on the highway; he stood in a dangerous place with his back turned towards a source of danger for an unreasonable time and disregarded the increase of dangers about him. The above principle is itself subject to a modification likewise grafted by the law for reasons of public policy. A defendant who is grossly negligent and reckless to the point of acting in disregard of the rights of others or of imputed willfulness cannot avail himself of a plea of plaintiff's contributory negligence; nor may a plaintiff who is acting so recklessly as to be in utter disregard of his own safety be heard to invoke the appli-

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cation of the principle above discussed. The law will refuse to impose on the defendant in his behalf any other than the doctrine of actually discovered peril. His negligence is considered to be proximate in the chain of causation.

A number of cases reach this result, whether based on this reasoning or not. A few of these will be outlined.

In *Quinn v. Chicago, etc., R. Co.*, 162 Ind., 442, 70 N. E., 526, it appeared that a pedestrian approached a street and railway crossing, and, while standing on or near a side track and awaiting its passing to cross, was struck and killed by a train backing on the side track. The court said:

"The effect of the general verdict is that the railroad company was negligent in moving its train westward on the side track, and that no signal of the starting or approach of said train was given by the ringing of the bell, the sounding of the whistle, or otherwise. The only question is whether negligence on the part of the decedent contributed to produce the injury complained of; in other words, do the answers of the jury show that, as a matter of law, the decedent himself was negligent, and that his want of care for his own safety was one of the causes of the accident and injury.

"Railroad crossings on streets and highways have always been recognized as places of extraordinary danger, and, when passing over the intersecting tracks, all persons competent to exercise care for their own protection and safety are required by the law to use

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their faculties of sight and hearing, when such use is possible, and to act upon the presumption that engines or trains may be expected to pass in either direction at any moment. It is also a matter of common knowledge that trains are often moved backward along the track, and that when running slowly they make but little noise. The place of danger at a street crossing is upon the track, and within a short distance outside the rails. If a traveler voluntarily or without reasonable cause stops on the track, or so near it as to expose himself to injury by passing trains, and, while in such a position of danger, fails to look in both directions and to listen for the noises which ordinarily indicate the approach of a train, and is struck by a locomotive or car negligently run upon the track, his own want of care must be held to be one of the causes of the accident, and there can be no recovery for the injury."

In *Dunworth v. Grand Trunk, etc., R. Co.*, 127 Fed., 307, 62 C. C. A., 225, where a street car employee was standing at a street crossing for about three minutes on a track unobservant (except of a passing train) and was struck by another train approaching from the rear without giving signals of warning, it was said:

"It is also said that the contributory negligence of the deceased should not prevent a recovery if the locomotive engineer, in the exercise of ordinary care, might have avoided the consequence of the deceased's negligence; and this under the modification of the rule as held by the supreme court in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S., 551 [11 Sup. Ct., 653] 35

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L. Ed., 270; *Railway Co. v. Ives*, 144 U. S., 408 [12 Sup. Ct., 679] 36 L. Ed., 485. There are no facts disclosed in this record calling for the application of the modification of the rule. It does not appear that the presence of the deceased upon the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe. To bring the case within the modification of the rule it is incumbent upon the plaintiff to make a showing calling for its application."

In *Denver City Tramway Co. v. Cobb*, 164 Fed., 41, 90 C. C. A., 459, the United States circuit court of appeals, through Van Devanter, C. J., said:

"It is also urged that the case is within that exception to the general rule making contributory negligence a defense, which is known as the 'last clear chance doctrine.' But there are two reasons why that is not so:

"First. The exception does not apply where there is no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury. *St. Louis, etc., R. Co. v. Schumacher*, 152 U. S., 77 [14 Sup. Ct., 479] 38 L. Ed., 361; *Illinois Cent. R. Co. v. Ackerman*, 144 Fed., 959, 76 C. C. A., 13 *et seq.*

"Second. The exception does not apply when the plaintiff's negligence or position of danger is not discovered by the defendant in time to avoid the injury. *Chunn v. City & Suburban Ry. Co.*, 207 U. S., 302 [28 Sup. Ct., 63] 52 L. Ed., 219; *Rider v. Syracuse Rapid*

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Transit Co., 171 N. Y., 139 [63 N. E., 836] 58 L. R. A., 125; Elliott on Railroads (2d Ed.), section 1175."

In *Zirkle v. Railway Co.*, 67 Kan., 77, 72 Pac., 539, the deceased was standing in the street of the city of Leavenworth where three railway tracks crossed it, and within striking distance of the second track, awaiting there the moving of a train that obstructed the crossing on the third track. He turned his back and engaged in conversation with a companion, and did not look in the direction of cars which were moving towards him on the second track. The court, holding barring contributory negligence, said:

"In the present case the deceased turned his back in the direction from which the danger came, and was absorbed in conversation. His conduct negated all suggestion of vigilance and showed a negligent disregard of the perils surrounding him. The fact that the freight train which struck him was standing still on what was called the storage track forty-five feet distant when he started over the crossing was not an assurance that it would remain stationary. The wheels of a railway car, adapted solely for the purposes of locomotion, are signals that the car may be moved at any time, as the wings of a bird indicate that it is prepared to fly. The indifference shown by the deceased in turning his back toward the train which ran upon him, and taking a position on the track where death or great bodily injury was inevitable if the cars moved to the place where he stood without diverting his attention from the conversation which engaged him, consti-

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tuted contributory negligence which cannot be excused."

See, also, *Moore v. Philadelphia, etc., R. Co.*, 108 Pa., 349; *Muscarro v. Railroad Co.*, 192 Pa., 8, 43 Atl., 527; *Atcheson, etc., R. Co. v. Withers*, 69 Kan., 620, 624, 77 Pac., 542, 78 Pac., 451; *Southern R. Co. v. Bailey*, 110 Va., 833, 67 S. E., 365, 27 L. R. A. (N. S.), 379; *Oliver v. Iowa Cent. R. Co.*, 122 Iowa, 222, 97 N. W., 1072; *Buckley v. Flint, etc., R. Co.*, 119 Mich., 583, 78 N. W., 655; *Meinrenken v. New York Cent., etc., R. Co.*, 81 App. Div., 132, 80 N. Y. Supp., 1074. We believe that no case can be found that grants a recovery to an adult plaintiff, erect and in possession of his faculties, who occupies a position on a railway track under conditions similar to those that surrounded plaintiff Todd.

The plaintiff urges by way of excuse the fact that his attention was diverted to the freight train coming in from the south. Like contentions were advanced in most of the cases just above quoted or cited, but denied in terms. It is argued that our case of *Patton v. Railway*, supra, is authority for this insistence. In that case the person injured entered on the track after an engine and cars attached to it had passed. But another cut of cars which had accidentally broken away from the front section ran over him as he walked the track with his back to them as they came by gravity down on him. His hearing of the slight noise so made by the cars was prevented by the noise of a waterfall underneath a bridge on which deceased was at the time he was struck or about to be struck.

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Here the plaintiff had the use, but made a misuse, of his faculties.

In *Guhl v. Whitcomb*, 109 Wis., 69, 74, 85 N. W., 142, 144 (83 Am. St. Rep., 889), it was well said on this question:

“‘Diversion of attention’ had long before been adopted to express conditions under which the watchfulness of one traveling on a sidewalk might be relaxed consistently with ordinary care. The expression had thus acquired a meaning in the law which obviously renders it inapplicable to the duty of vigilance resting on one about to cross a railway track, which is not, like a city sidewalk, an assurance of probable safety, but, on the contrary, a proclamation of peril. The expression was used (casually, it is true) in *Piper v. C., M. & St. P. R. Co.*, 77 Wis., 247 [46 N. W., 165], but there it was applied to a situation where the plaintiff’s attention was irresistibly withdrawn from an approaching train by attempted runaway of his team. The expression having again been used in the *Ward Case*, and both cases being pressed on this court in *Schneider v. C., M. & St. P. R. Co.*, 99 Wis., 386 [75 N. W., 169], the present Chief Justice took occasion to point out that in his use of terms in the *Piper Case* he applied the expression to an absolute forcing away of the attention. That term was again used to express the situation which might excuse momentary relaxation of watchfulness in *Koester v. C. & N. W. R. Co.*, 106 Wis., 460, 469 [82 N. W., 295]. In numerous other cases circumstances which might well satisfy the ex-

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pression 'diversion of attention' have been held insufficient to excuse a failure to continually look and listen. . . .

"The rule stated in these decisions is that the duty to look and listen is absolute where the opportunity exists. In most of these cases the exception in favor of reasonable diversion of attention was urged, and its applicability was apparent if those words be used in the sense now contended for by respondent. It is considered, therefore, that all exception to the duty to look and listen at a railroad crossing resulting from diversion of attention has been repudiated by this court, except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty. The rule is general and applies as well to the driver of a team as to the foot passenger, with the difference, however, that it is much more difficult to conceive circumstances surrounding the latter which can at once deprive him of the opportunity to observe and the ability to stop short of the actual peril. With him a single step, wholly under his control crosses the danger line. With the driver many things may complicate the situation—momentum, conduct of horses, multiplication of perils, and the like."

Of course, what is said in the latter portion of this excerpt from the opinion of the Wisconsin court, and also expressions used in other quotations, are to be considered, so far as local application is concerned, along with the opinions of this court in the cases of

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Railroad v. Dies, 98 Tenn. 655, 41 S. W., 860; *Wilson v. Citizens' St. R. Co.*, 105 Tenn., 74, 58 S. W., 334; *Middle Tenn. R. Co. v. McMillan*, 184 S. W., —; and *Railroad v. Satterwhite*, *supra*.

Agreeing as we do with the trial judge in the disposition he made of the case, a reversal of the judgment of the court of civil appeals results. Let judgment be entered here sustaining the motion of the defendant company for peremptory instructions.

Green v. Fidelity & Guaranty Co.

GREEN v. UNITED STATES FIDELITY & GUARANTY Co. *et al.*

(*Knoxville*. September Term, 1915.)

1. **PRINCIPAL AND SURETY.** Fidelity bonds. Construction of contract.

Contracts of fidelity insurance are to be likened to contracts of insurance rather than to contracts of personal suretyship, and are to be construed by the same exact rules of the law of insurance, and the language of the bond, being that selected and employed by the insurer issuing it for a consideration, when ambiguous or doubtful, must be given the strongest interpretation in favor of the person indemnified which it will reasonably bear. (*Post*, pp. 121, 122.)

Cases cited and approved: *Anderson v. Fitzgerald*, 4 H. L. Cas., 484; *American Surety Co. v. Pauly*, 170 U. S., 133; *Railroad v. Fidelity & G. Co.*, 125 Tenn., 690; *Guarantee Co. v. Savings Bank*, 183 U. S., 419; *Seay v. Georgia Life Ins. Co.*, 132 Tenn., 673.

2. **PRINCIPAL AND SURETY.** Fidelity bonds. Construction of contract. Embezzlement.

Under a fidelity bond executed by the president of a banking and trust company as principal and a fidelity company as surety to save the bank harmless from any pecuniary loss sustained by reason of the fraud or dishonesty of the principal amounting to embezzlement or larceny, it is not necessary to a recovery that the insured introduce such proof as would convict the principal of the crime of larceny or embezzlement as defined by the criminal law. (*Post*, pp. 122, 123.)

Cases cited and approved; *Aetna Indemnity Co. v. Crowe Coal & M. Co.*, 154 Fed., 545; *Champion Ice Mfg. Co. v. Am. Bonding Co.*, 115 Ky., 863; *City Trust, etc., Co. v. Lee*, 204 Ill., 69; *Rankin v. U. S. Fid. & G. Co.*, 86 Ohio St., 267.

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3. PRINCIPAL AND SURETY. Fidelity bonds. Renewal contract. Construction. Term.

Under a fidelity bond against pecuniary loss from the fraud or dishonesty of the president of a banking and trust company amounting to embezzlement or larceny, issued in 1908, which provided indemnity during the term, and any subsequent renewal of such term by reason of the specified acts "committed during the continuance of such term or any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter, expressed an intention to protect against losses within the period specified in the bond, and provided that on its execution the insurer should not thereafter be liable under any bond previously issued to the insured, and that on the issuance of any subsequent bond all liability should cease, that only one bond should be in force at one time, unless otherwise stipulated, and which was renewed annually upon an additional consideration, "subject to all the covenants and considerations of the original bond," the renewals constituted separate contracts, and the insured could not recover unless the alleged defaults occurred on some specified date or in some specified period covered by one of such contracts, and discovered within the time limited therefor. (*Post*, pp. 123-137.)

Cases cited and approved: *Fidelity & Cas. Co. v. Consolidated Nat. Bank*, 71 Fed., 116; *Fidelity Deposit Co. v. Champion*, 133 Ky., 74; *Hawley v. U. S. Fid. & G. Co.*, 100 App. Div., 12; *Campbell Milk Co. v. U. S. Fid. & G. Co.*, 161 App. Div., 738.

Cases cited and distinguished: *De Jernette v. Fid. & C. Co.*, 98 Ky., 558; *U. S. Fid. & G. Co. v. Williams*, 96 Miss., 10; *Proctor Coal Co. v. U. S. Fid. & G. Co. (C. C.)*, 124 Fed., 424; *U. S. Fid. & G. Co. v. Citizens' Nat. Bank*, 147 Ky., 287; *U. S. Fid. & G. Co. v. Shepherds' Home*, 163 Ky., 706; *First Nat. Bank v. U. S. Fid. & G. Co.*, 110 Tenn., 10.

4. PRINCIPAL AND SURETY. Fidelity bonds. Proofs of loss. Liability.

Under such bond, providing that the insurer at the expiration of three months after satisfactory proof would pay its liability,

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and that on the discovery of any act which might result in a claim the insured should as soon as possible give notice to the insurer in writing, and should within three months after the discovery of the default furnish the insurer reasonable particulars and proofs of the correctness of the claim, and declaring that the bond should be void if the employer failed to give such notice, but not providing that a failure to make proofs of the correctness of the claim should forfeit the bond, the allegation of a claim duly made showed that the complaint as the commencement of the action was filed after the lapse of such three months' period. (*Post*, pp. 137, 138.)

Cases cited and approved: *Ins. Co. v. Whitaker*, 112 Tenn., 151; *Dixon v. State Mut. Ins. Co.*, 34 Okl., 624.

5. PRINCIPAL AND SURETY. Fidelity bonds. Denial of liability. Time to use. Waiver.

A denial of its liability on its fidelity bond made when notice of a claim was given waived the provision of the bond tending to render the suit premature, if brought before the expiration of three months after proof of loss. (*Post*, pp. 138, 139.)

Cases cited and approved: *French v. Fid. & C. Co.*, 135 Wis., 259; *Jennings v. Brotherhood Acc. Co.*, 44 Colo., 68; *Atlantic Horse Ins. Co. v. Nero* (Miss.), 66 South., 780.

FROM KNOX

Appeal from the Chancery Court of Knox County.—
R. H. SANSON, Special Chancellor.

D. C. WEBB, HUGH M. TATE, and WRIGHT & JONES,
for appellant.

SHIELDS & CATES and JEROME TEMPLETON, for appellee.

Green v. Fidelity & Guaranty Co.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed by John W. Green, receiver of the insolvent Knoxville Banking & Trust Company, to recover on a bond executed by W. H. Gass, as principal obligor, and the fidelity company, as surety. The bond in the sum of \$10,000 was exacted of Gass to save harmless the bank from any pecuniary loss it might sustain by reason of the fraud or dishonesty of Gass in connection with his duties as president of the indemnified institution.

The original bond was effective for the period of February 1, 1908, to February 1, 1909, and there were executed from year to year by the fidelity company "continuation certificates," the last of which bore date of February 1, 1912, for a period expiring one year from that date. The pertinent provisions of the bond and the certificates of renewal are set out in the body of the opinion.

The bond and the last renewal certificate were made exhibits to the bill of complaint.

Demurrers were filed by the two defendants and sustained by the special chancellor, the grounds of which sufficiently appear in the discussion of the case that follows. The receiver appealed to this court, and has assigned errors.

The dishonesty of Gass, as charged, consisted in his withdrawals of funds while he was practically insolvent, by means of overdrafts made without authority,

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which he subsequently covered by notes, not accepted by the bank, and executed for the purpose of concealing the fraudulent character of such withdrawals, and that this was accomplished by reason of his official position.

"All of said funds were in the control of defendant W. H. Gass by virtue of his position as president and were by him fraudulently taken and converted to his own use," and therefore amounted to embezzlement or larceny.

It was alleged that "claim had been made upon, and all notices given to, the defendant fidelity company according to the terms of the bond exhibited."

"The wrongful acts of said Gass complained of, and which resulted in said pecuniary loss, were all discovered within six months after the termination of said Gass' relation with the bank, which termination took place at the end of the last extension period of said bond."

Before passing to a consideration of the various provisions of the bond that are involved in the contentions of the respective parties on the demurrer, we shall advert to the rules of construction applicable to such contracts of fidelity insurance.

It is now well settled that such contracts are to be likened to contracts of insurance; and therefore they are not to be construed by the liberal principles applied to personal suretyship, but by the more exacting rules of the law of insurance. The language of the bond contract is that selected and employed by the fidelity

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company issuing it for a consideration, and, when ambiguous or doubtful, must be given the strongest interpretation in favor of the person indemnified which it will reasonably bear. This rule of construction has been adopted both in England and in this country. *Anderson v. Fitzgerald*, 4 H. L. Cas., 484; *American Surety Co. v. Pauly*, 170 U. S., 133, 18 Sup. Ct., 552, 42 L. Ed., 977; *Railroad v. Fidelity & G. Co.*, 125 Tenn., 690, 148 S. W., 671.

However, "this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties." *Guarantee Co. v. Mechanics' Savings Bank*, 183 U. S., 419, 22 Sup. Ct., 131, 46 L. Ed., 253; *Seay v. Georgia Life Ins. Co.*, 132 Tenn., 673, 179 S. W., 312.

Counsel for the obligor, on one of the grounds of the demurrer, contend that the default of Gass was neither embezzlement nor larceny, and that therefore it may not be held to respond, the contract obligation on its part being to make good "such pecuniary loss as might be sustained by the employer by reason of the fraud or dishonesty of said employee . . . amounting to embezzlement or larceny." For authority counsel refer to the case of *Ætna Indemnity Co. v. Crowe Coal & M. Co.*, 154 Fed., 545, 83 C. C. A., 431.

But the decided weight of authority is to the effect that it is not necessary in order to his relief that the employer introduce such proof as would convict the delinquent employee of the crime of larceny or embezzlement as defined in the criminal law. *Champion Ice*

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Mfg. Co. v. American Bonding Co., 115 Ky., 863, 75 S. W., 197, 103 Am. St. Rep., 356; *City Trust, etc., Co. v. Lee*, 204 Ill., 69, 68 N. E., 485; *Rankin v. U. S. Fidelity & G. Co.*, 86 Ohio St., 267, 99 N. E., 314; 19 Cyc., 518.

The reasoning of these cases, which leads us to adopt the rule they announce, is: That the parties were not contracting on the basis of an enforcement of the criminal laws of the State; that, if only indemnity for losses suffered by reason of technical larceny or embezzlement had been intended, that purpose could have been expressed clearly and in fewer words; that the words "larceny and embezzlement," in the bond, are used as generic terms to indicate the dishonesty and fraudulent breach of any duty or obligation upon the part of the officer in connection with his duties as president.

We think it manifest that, if the other and narrower construction were given the bond contract, and if that fact were understood by the commercial public, fidelity companies using that form of bond would do very little business. It is not unfair to give the bond the meaning assigned it by a majority of the decisions that antedated its issuance.

A point yet more seriously pressed by the counsel of the obligor is: That the only bond (or renewal) remaining in force covered a period from February 1, 1912, to February 1, 1913, and that it is not alleged in the bill that the loss claimed was sustained, or the acts of

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Gass out of which such loss arose were committed, within the period so covered.

This involves a consideration of the nature of the contract embodied in the bond and the renewal thereof.

The original bond, issued in 1908, contained the following clauses:

“Now, therefore, this bond witnesseth that for the consideration of the premises the company shall, during the term above mentioned, or any subsequent renewal of such term, and subject to the conditions and provisions herein contained, at the expiration of three months next after proof satisfactory to the company, as hereinafter mentioned, make good and reimburse to the said employer such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter, or within six months after the death or dismissal or retirement of said employee from the service of the employer, within the period of this bond, whichever of these events shall first happen; the company's total liability on account of said employee under this bond or any renewal thereof not to exceed the sum of ten thousand (\$10,000) dollars. . . .

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"Provided, further, that the company shall not be liable under this bond for the amount of any balance that may be found due the employer from the employee, and which may have accrued prior to the date thereof, and which may be discovered within the period of this bond or of any renewal thereof; it being the true intent and meaning of this bond that the company shall be responsible as aforesaid for moneys, securities, or properties diverted from the employer within the period specified in this bond. . . .

"That the company upon execution of this bond shall not thereafter be responsible to the employer under any bond previously issued to the employer on behalf of said employee, and upon the issuance of any bond subsequent hereto upon said employee in favor of said employer all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company."

The last renewal receipt or continuation certificate recited that in consideration of \$25 the obligor company continues in force the bond in the sum of \$10,000 in behalf of W. H. Gass, president, in favor of Knoxville Banking & Trust Company, for the period beginning the 1st day of February, 1912, and ending on the 1st day of February, 1913, "subject to all covenants and considerations of said original bond."

The contention of the obligor is that the original bond and each renewal thereof, is a separate contract,

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and that it was necessary for complainant to allege that the claimed defaults of Gass occurred on some specified date or in some specified period, in order to a determination whether they were covered by any and which of such separate contracts of indemnity, and whether they were discovered within the time limited therefor.

We are of opinion that, if there is not to be found in the instant indemnity contract language providing to the contrary, the bond and the continuation certificate are to be deemed to constitute separate contracts in the sense contended for as above.

At an earlier day fidelity companies issued a bond contract that may have been properly so construed. A case involving such a bond is relied upon by the obligor. *DeJernette v. Fidelity & Casualty Co.*, 98 Ky., 558, 33 S. W., 828. It was there said:

“A renewal of the policy constitutes a separate and distinct contract for the period of time covered by such renewal. It is, however, a contract with the same terms and conditions as is evidenced by the bond which is renewed, because the renewal receipt recites that it is renewed ‘in accordance with the tenor of the bond.’

. . . Such contracts standing as distinct and separate contracts, the rights of the parties must be determined under them as such. A renewal of the bond did not alter, change, limit, or increase the rights of the parties under the bond, nor did such renewal increase or limit the time for the performance of any act which is required to be done by the parties to maintain their

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rights under the bond. When the bond speaks of acts 'committed during the continuance of said term or any renewal thereof,' it has reference to the bond as one contract, and the renewal receipts thereof as another and distinct contract. For the fraud or dishonesty of the employed during the time covered by the bond no recovery could be had under the renewal contract, nor will the contract of renewal enable the assured to maintain an action on the bond which had been barred by the lapse of time."

The language of the bond in the *De Jernette Case* was:

"Make good and reimburse to the employer . . . by reason of fraud or dishonesty of the employed . . . amounting to embezzlement or larceny which has been committed or discovered during the continuance of said term or any renewal thereof"—without any provision for such discovery within any number of months thereafter.

Also in the case of *United States Fidelity & G. Co. v. Williams*, 96 Mass., 10, 49 South., 742, a bond issued by the obligor, which is the defendant in this case, was under review in connection with a contention based on a demurrer to the effect that there was no specific averment in the declaration that the acts done were done "during the continuance of any particular term, or of any renewal thereof, and discovered during said continuance, or of any renewal thereof, or within six months thereafter." The court, citing the *De Jer-*

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nette Case, held with the demurrant's contention that the bonds were separate and distinct contracts, and said:

"Each bond is liable for such losses, and only such losses, as occur during its separate life, which is fixed by the contract for one year each, and discovered during the continuance or renewal, or within six months after the expiration of the year, but always limiting the right of recovery to losses which actually happen within the life of the particular bond, The declaration, in order to show liability, must declare on the particular bond or renewal current at the time of the loss, and further allege that the loss was discovered within six months of the expiration of the bond."

See, also, *Fidelity & Casualty Co. v. Consolidated Nat. Bank*, 71 Fed., 116, 17 C. C. A., 641; Frost on Guaranty Insurance (2d Ed.), section 40 *et seq.*

In *Proctor Coal Co. v. U. S. Fidelity & G. Co.* (C. C.), 124 Fed., 424, Newman, District Judge, said:

"It is urged that certain language in the bond shows that it was intended to be a continuous contract covering the period of the bond or any subsequent renewals. The language referred to is this: 'Make good and reimburse to the employer all and any pecuniary loss sustained by the employer,' etc., 'occurring during the continuance of this bond or any renewals thereof, and discovered during said continuance, or within six months thereafter.' I am unable to agree with the argument of plaintiff as to the proper construction to be put on this language. I think it should be construed

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so as to read in this way: 'Occurring during the continuance of this bond or any renewal thereof, and discovered during the continuance of this bond, or during the continuance of any renewal'—that is, that the discovery must be within six months of the expiration of the original bond, or within six months of the expiration of any renewal thereof"—citing the *De Jernette Case*.

However, in a later case (*U. S. Fidelity & G. Co. v. Citizens' Nat. Bank*, 147 Ky., 287, 143 S. W., 998) the court of appeals of Kentucky had before it a case based on a bond issued by the same obligor in 1904, and the court responded to a contention of the obligor, as appellant, that the bond and the renewal certificate constituted separate contracts, and that therefore the indemnified bank must allege the loss occurring under each of them, and that the rights of the parties should be determined as to rules of notice and time of action in accordance with this theory. It was said:

"Appellant refers to the case of *De Jernette v. Fidelity & Casualty Co.*, 98 Ky., 558, 33 S. W., 828. This court did hold that the bond and renewals in that case were separate contracts, but upon a close examination of the facts of that case and those in the case at bar a difference will be found. It is reasonable to presume that because of the construction placed upon the contract in the *De Jernette Case* that portion of the public wanting indemnity insurance required a different contract, as it seldom occurs that embezzlement or

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larceny is detected, within three, six, or twelve months after committed, especially if the employee has been in the service of his employer for some time and is trusted by him and is shrewd. Therefore, in order to obtain business, the indemnity and guaranty companies gave them a contract which would protect them.

"As stated, the bond in question was issued March 15, 1904, and the bank paid the premium, \$45 at that time. Appellant agreed in the bond to indemnify the bank in the sum of \$15,000 against any loss it might sustain at the hands of its cashier by any acts of his which amounted to embezzlement or larceny, for the term of twelve months, provided his wrong doing was discovered within six months from the time the contract expired. If the bond and four renewal certificates contained only these stipulations, then appellant's contention is correct, and the case would be governed by the De Jernette Case, but we are of the opinion that the facts of this case show that the parties intended that the bond and four continuation certificates should constitute one continuous contract. In the original bond this language is used:

"The company shall, during the term above mentioned or any subsequent renewal of such term, . . . make good and reimburse to the said employer, said pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continu-

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ance of said term or any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter.'

"Similar language is used throughout the bond, and we are unable to understand why. If the bond was intended by the parties to have no connection with any other, why was this language used? For what was it inserted? It appears from this language that appellant was obligating itself in the sum of \$15,000 to pay the bank for any embezzlement or larceny committed by its cashier, not only from March 15, 1904, to March 15, 1905, but to any period that might be fixed by any renewal of the contract."

In the still later case, *U. S. Fidelity & G. Co. v. Shepherds' Home*, 163 Ky., 706, 174 S. W., 487, the court dealt with a bond executed in 1909. The effect of the obligor was to limit recovery to that part of the shortage occurring during the last year. The court reaffirmed the holding that the bond was a continuing obligation; the renewals operating to continue a single indemnifying contract which "covered the period of consecutive years over which the renewals were issued." The court laid particular stress upon the following language in the bond:

"Which shall have been committed during the continuance of said term, or any renewal thereof, and discovered during said continuance or within three months thereafter."

In *Rankin v. U. S. Fidelity & G. Co.*, supra, the supreme court of Ohio passed upon a bond executed by

the same obligor and upon a contention of its counsel that the action could not be maintained because the time limited by the terms of the contract for the discovery of the defaults of the employee had been exceeded. The acts of defalcation occurred within the period covered by the original bond, and they were not discovered until more than six months after the date of expiration of that period. The court said:

“It is entirely clear that, if the question involved a consideration alone of the terms of the original bond, the time limited for the discovery has been exceeded. But the terms of the original bond show that, when it was executed, a renewal or continuation thereof was contemplated and an instrument was executed whereby the company continued in force ‘the original bond subject to its covenants and conditions until February 5, 1905.’ It is obvious that these instruments are to be construed together, not only because they relate to the same subject-matter, but because each in terms refers to the other. On this point counsel are agreed. In favor of the obligee it is insisted that the instruments thus construed are, in legal effect, the same as though the original bond had been executed for two years instead of one, and that this view must determine all questions respecting the rights and liabilities of the parties, so that the company shall be liable for a single penalty, and there is a continuance for a year of the period in which Spear’s default might create a liability for that penalty, as well as for the time of its discovery.

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“In favor of the obligor it is insisted that, however it would be as to other questions which might arise, there should, with respect to the question presented, be such construction as would be required by an express stipulation that, notwithstanding the continuance, a liability on account of a default occurring within the first year should be conditioned upon the discovery of that default within six months after the end of that year. There being no such express stipulation, we have to inquire whether it is implied in the natural meaning of the words used and their grammatical and logical relation. It might be conjectured that the parties regarded the word ‘renew,’ used in the first instrument, as synonymous with the word ‘continue,’ used in the second. But there need be no resort to conjecture, since what the parties did in the second instrument was ‘to continue in force the former instrument for the period beginning the 5th day of February, 1904, and ending on the 5th day of February, 1905, subject to all the covenants and conditions of said original bond.’ By the material stipulations of the original bond the obligor undertook to make good any loss which the obligee might sustain by reason of the fraud or dishonesty of its cashier ‘committed during the continuance of said term or any renewal thereof and discovered during said continuance or any renewal thereof, or within six months thereafter.’ Here are no words of severalty or discrimination respecting the time of the discovery, and since it would not be within the proper function of interpretation to supply such

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words, the terms of the stipulation must be regarded as within the same construction. This view is enforced by the consideration that the term during whose continuance a default was contemplated by the original instrument is the term which was continued by the express terms of the second. No terms are used to suggest that any difference in the relation of the parties was intended by the second instrument than such as would have existed if the original bond had been for two years. It is conceivable that, if this question had been anticipated by the parties at the time of the execution of these instruments, clearer terms would have been used to express their intention with respect to it. But certainly, in view of their stipulations, nothing more favorable to the obligor can be concluded than that an interpretation against it is doubtful."

We have made ample quotation from the above decisions because of the contrariety in the judicial construction of the contracts, and because of the importance of the question, due to the increasing use of fidelity companies as sureties on bonds. It is observed that, while the Kentucky court seeks to distinguish the *De Jernette Case* from the later cases, the Mississippi court conceives that its principles are applicable to the new form of bond to which the Kentucky court denies that it is applicable.

The fact that the courts have thus arrived at variant conclusions may be attributable in part to the difference in the wording of the several contract clauses; but, so far as this is not the case, there is by the very

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fact of such variance in views a demonstration of the doubtful meaning of the paragraph of the bond.

The argument of the supreme court of Ohio in the *Rankin Case* shows quite clearly that the obligor has, to say the least, used language that is doubtful as to its true meaning. Certain it is that indemnity to the obligee was in the contemplation of both parties, and room is left for the employment of the rule of construction above referred to—the resolving of substantial doubts in favor of the one assured or indemnified. It may be that the obligor, in the competition with other fidelity companies for business, sought to make its bond contracts attractive by the use of the terms so used, tending to make the contracts continuous in character.

The provisions, when so construed, would have the practical effect to hold the obligee as a patron, by way of renewals. If the bank in this instance had taken out a new bond with a rival fidelity company, at the expiration of the original bond, it would not have been as amply protected. In order to persuade it to a continuance, the obligor held out an accumulating advantage in the provision that discovery of a past delinquency “during said continuance or any renewal thereof,” properly proven, would fix liability on the part of the obligor. As stated above, but for the use of the particular terminology, or its equivalent, a fidelity bond and a renewal by annual payments would seem to be separate obligations.

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The case of *First Nat. Bank v. U. S. Fidelity & G. Co.*, 110 Tenn., 10, 24, 75 S. W., 1076, 1080, 100 Am. St. Rep., 765, 773, as we construe it, did not pass on this particular phase of the contract embodied in the bond, but what was there said was directed against a holding by the court of chancery appeals to the effect that the obligations were so far separate and independent that two penalties aggregating \$14,000 might be recovered, though the original bond stipulated for indemnity to the extent of \$7,000. This court ruled:

“So that, under the plain terms of the bond, the maximum liability is \$7,000, and no further, whether the default occurred during the currency of the original bond or during the renewal thereof.”

We think that this case has been misunderstood so far as it is cited in support of the surety company's present contention.

All of the cases above cited are in accord in holding that only one penalty is recoverable. See, also, *Fidelity Deposit Co. v. Champion*, 133 Ky., 74, 117 S. W., 393. However, the New York courts hold that separate obligations are created by the original bond and the continuation or renewal certificate, and so far so that two penalties may be recovered. *Hawley v. U. S. Fidelity & G. Co.*, 100 App. Div., 12, 90 N. Y. Supp., 893, affirmed 184 N. Y., 549, 76 N. E., 1096; *Campbell Milk Co. v. U. S. Fidelity & G. Co.*, 161 App. Div., 738, 146 N. Y. Supp., 92. We think the bond is specific in its provisions that but one penalty shall accrue.

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In some senses the renewal effected by the continuation certificate is a new or "separate" contract. This it may be without being "independent." It is requisite that the minds of the original parties meet again in assent to the extension of the contractual relation over the new period; and it depends upon the payment of a distinct consideration. But those facts have not been deemed sufficient to make the payment of two penalties obligatory as upon distinct contracts. Neither, in our opinion, do they give occasion, necessarily, to the obligations being treated as independent in the matter of fixing the period for discovery in order to liability. The original bond incorporates terms that project it forward to cover the renewal period, without separating the periods for discovery purposes. The reason in our view, is the purpose on the part of the company to hold the indemnified person to persistence as a patron. In another field of insurance a cumulative feature appears; frequently in accident insurance the recoverable sum is made to be an augmenting quantity from year to year, for quite a period, provided the policy is kept renewed by the payment of continuation premiums.

The next question for determination arises on the following provisions of the bond:

"The company shall . . . at the expiration of three months next after proof satisfactory to the company, as hereinafter mentioned, make good, etc. . . .

"Provided, that on the discovery of any act capable of giving rise to a claim hereunder the employer shall,

at the earliest practicable moment, give notice thereof to the company, and any claim made under this bond shall be in writing addressed to the company at its head office in the city of Baltimore, and shall within three months after the discovery thereof, at the employer's expense, furnish to the company reasonable particulars and proofs of the correctness of said claim."

It is not specifically alleged that any proofs of the claim of loss were made, and the obligor's contract provision to reimburse was conditioned on the expiration of three months following the making of such proofs of the correctness of the claim. It is therefore contended that it is not made to appear that the bill of complaint, as the commencement of the action, was filed after the lapse of such three months period.

It is provided that the bond shall become void, as to any claim under it, if the employer shall fail to give notice to obligor, but no provision is inserted that a failure thereafter to make proofs of the correctness of the claim shall have the effect to forfeit the bond as regards that claim. It seems, therefore, that, as a claim is alleged to have been duly made, the contention of the obligor company is not maintainable. *Insurance Co. v. Whitaker*, 112 Tenn., 151, 79 S. W., 119, 64 L. R. A., 451, 105 Am. St. Rep., 916, and annotation of case of *Dixon v. State Mut. Ins. Co.*, 34 Okl., 624, 126 Pac., 794, L. R. A., 1915F, 1213.

It is furthermore alleged that when notice of the claim was given, a denial of liability on the bond was

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made by the company, thus waiving the provision tending to render the suit premature if brought before the expiration of three months after proofs of loss. *French v. Fidelity & C. Co.*, 135 Wis., 259, 115 N. W. 869, 17 L. R. A. (N. S.), 1011; *Jennings v. Brotherhood Accident Co.*, 44 Colo., 68, 96 Pac., 982, 18 L. R. A. (N. S.), 109, 130 Am. St. Rep., 109; *Atlantic Horse Ins. Co. v. Nero* (Miss.), 66 South., 780.

Without discussing here in detail the other grounds of the demurrer, we are of opinion that the defendants were put to their answers. Reversed, with remand. Costs of the appeal will be paid by appellees.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION

JACKSON. APRIL TERM, 1916.

B. M. PERKINS *v.* B. M. BROWN.

(*Jackson.* April Term, 1916.)

COSTS. On appeal. Expense of bill of exceptions. Unnecessary matter. "Full costs."

Where a successful appellant in an action at law, by violating supreme court rule 2 (126 Tenn. 716, 160 S. W. vii), requiring bills of exception to state testimony in narrative and concise form, increased materially the size of the transcript, he should pay one-half of the appeal costs, notwithstanding the rule that in actions at law the successful party is entitled to recover full costs, since "full costs" do not include costs so added.

Cases cited and approved: Perkins *v.* Brown, 132 Tenn., 294; Cincinnati, etc., R. Co. *v.* Shelton, 123 Tenn., 513.

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the 135 Tenn.] (140)

Perkins v. Brown.

Court of Civil Appeals from the Supreme Court.—J. P. YOUNG, Judge.

W. P. BIGGS, for plaintiff in error.

WILSON & ARMSTRONG, for defendant in error.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

A motion to retax the costs accruing on the appeal has been made in this case, which was disposed of at the last term; the opinion being reported in 132 Tenn., 294, 177 S. W., 1158, L. R. A., 1915F, 723.

In the original judgment all the costs of the appeal were ordered to be paid by Brown, the appellee and losing party, and in favor of Perkins. The motion to retax proceeds upon the ground that in preparing the bill of exceptions, the attorney of Perkins did not for him obey the rule of this court in respect thereto, and that the failure greatly and needlessly increased the size of the transcript on appeal. The rule referred to is as follows:

“Counsel in the preparation of bills of exceptions in the trial court, in all cases, shall state the testimony of witnesses in narrative form, omitting therefrom all that is immaterial or which is no longer controverted or does not bear upon any ground assigned in the trial court for a new trial. The questions asked witnesses and answers made must not be given, unless the effect of the testimony cannot otherwise be made to clearly appear, in which case it may be done.

“The object of this rule is to save costs to litigants and facilitate the investigation of the record by the court.” Rule 2 (126 Tenn., 716, 160 S. W., vii).

It appears that, had the rule been complied with, the size of the transcript would have been very materially reduced.

Is the appellee, the losing party, to be onerated with the payment of this excess cost?

He is not. Notwithstanding the rule that in actions at law, the successful party is entitled to recover full costs (*Cincinnati, etc., R. Co. v. Shelton*, 123 Tenn. 513, 130 S. W., 843), he may not by thus ignoring this court rule cause unnecessary costs to accrue and prevail on a claim to recover same. “Full costs” does not include costs so added. They are not legitimate, recoverable costs in behalf of the appellant, on whom falls the burden of saving and preparing the bill of exceptions as the groundwork of his appeal. Had the appellant lost, we would tax the transcript cost to him, but when his counsel saw fit to proceed in open disregard of a rule that was promulgated for the very purpose of saving costs to all parties, there was forfeited the right to have the same, at least so far as unnecessarily imposed, taxed against his opponent.

The motion is allowed, and one-half of the costs of the appeal will be paid by the prevailing appellant.

What is here ruled is not to be deemed to bind us not to disallow, in future cases, the entire costs of transcripts so prepared, should attorneys, practicing at the bar of this court, persist in ignoring the rule quoted above.

Bledsoe v. State.

HARRY BLEDSOE v. THE STATE.*

(Jackson. April Term, 1916.)

1. RAPE. Evidence. Corroboration of female.

In Pub. Acts 1911, chapter 36, providing punishment for criminal abuse of females, the proviso that no conviction shall be had on the unsupported testimony of the female is complied with if there is adduced sufficient evidence of another than the female which fairly tends to convict the defendant of the crime. (*Post*, p. 144.)

Acts cited and construed: Acts 1911, ch. 36.

Cases cited and approved: *Clapp v. State*, 94 Tenn., 186; *Suther v. State*, 118 Ala., 88; *State v. Hayes*, 105 Iowa, 82; *State v. Brassfield*, 81 Mo., 151.

2. RAPE. Evidence. Corroboration of female.

Such evidence need not be direct and positive, in the sense of being sufficient to convict, independent of that of the female alleged to have been debauched, but simply as to such facts or circumstances as tend to support the female in her testimony upon fact or facts essential to constitute the offense. (*Post*, pp. 144, 145.)

Cases cited and approved: *Wright v. State*, 31 Tex. Cr. R., 354; *State v. Smith*, 84 Iowa, 522.

FROM SHELBY

Appeal from the Criminal Court of Shelby County.—JESSE EDGINGTON, Judge.

*As to whether the corroboration of prosecutrix necessary to conviction of rape be supplied by her own complaints out of court see note in 26 L. R. A. (N. S.), 1149.

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PRESCOTT & MAGEVENY, for appellant.

W. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Conviction for violating the age of consent statute, and appeal.

Acts 1911, chapter 36, providing for punishment for the criminal abuse of females, contains a proviso applicable to offenses against females of certain ages to the effect that "no conviction shall be had for said offense, on the unsupported testimony of the female in question."

This proviso is complied with if there is adduced sufficient evidence of another than the female which fairly tends to convict the defendant of the commission of the crime; and this evidence may be in relation to material and substantive fact or facts which may lead the jury to the finding that she is worthy of credit. *Clapp v. State*, 94 Tenn., 186, 195, 30 S. W., 214; *Suther v. State*, 118 Ala., 88, 24 South. 43; *State v. Hayes*, 105 Iowa, 82, 74 N. W., 757; *State v. Brassfield*, 81 Mo., 151, 51 Am. Rep., 234; 11 Enc. Ev., 698.

Further, the corroborative evidence need not be direct and positive, in the sense of being sufficient to convict, independent of that of the female alleged to have been debauched, but simply as to such facts or circumstances as tend to support the female in her

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testimony upon fact or facts essential to constitute the offense. *Wright v. State*, 31 Tex. Cr. R., 354, 20 S. W., 756, 37 Am. St. Rep., 822; *State v. Smith*, 84 Iowa, 522, 51 N. W., 24.

The legislative policy of this State, as evidenced by several enactments, has been consistently progressive in respect of the punishment of offenses of this character; and we believe that sound judicial policy dictates that the procedure under the acts should not be too stringent in respect of the proof requisite to support the female. The statutes were intended to safeguard the young womanhood of the State, thereby protecting the social fabric at its base; and we feel no inclination to declare a stricter rule than the one above, touching proof thereunder.

The testimony in the case at bar we find to be sufficient to corroborate the young girl debauched who testified in behalf of the State.

Affirmed.

Paul Jones & Co. v. Wilkins.

PAUL JONES & COMPANY v. T. B. WILKINS.*

(Jackson, April Term, 1916.)

1. INTOXICATING LIQUORS. Illegality. Right of action for price.

Mere knowledge on the part of a seller of intoxicants that the buyer intends illegally to resell the liquors will not render the contract void, so as to bar the seller's action for the purchase price, though if the seller participates in or contributes to the purchaser's intention to sell illegally, or does any act to facilitate or further the design to transgress the law, or has an interest therein, the right to recover the price is lost. (*Post*, p. 148.)

Cases cited and approved: *Bank v. Burke*, 185 S. W., 704; *Tracy v. Talmadge*, 14 N. Y., 173; *Anheuser-Busch Brewing Assn. v. Mason*, 44 Minn., 318; *Washington Liquors Co. v. Shaw*, 38 Wash., 398; *Frankel v. Hillier*, 16 N. D. 387.

2. INTOXICATING LIQUORS. Sale of intoxicating liquors. Recovery of price. Statute.

Where the seller of liquors knew through its local agent that the buyer was running a wide-open liquor saloon in violation of law, and made the shipment to a transfer company, not to the consignee, marked merely with his initials, so that the public would not know to whom it was to be delivered, such seller could not recover the price, having aided the buyer's design to transgress the law and circumvented the legislature's object in passing Acts (Ex. Sess.) 1913, chapter 1, requiring common carriers to cause all consignees of liquor to sign, before delivery, an affidavit setting out his name, etc. (*Post*, pp. 148-150.)

Acts cited and construed: Acts 1913, ch. 1.

Cases cited and approved: *Kohn v. Melcher* (C. C.), 43 Fed., 641; *Feineman v. Sachs*, 33 Kan., 621; *Corbin v. Houlehan*, 100 Me. 246; *Gaylord v. Soragen*, 32 Vt., 110.

*Authorities on the right to recover for price of liquor sold for illegal use are gathered in a note in 15 L. R. A., 836.

Paul Jones & Co. v. Wilkins.

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
H. W. LAUGHLIN, Judge.

M. A. HALL and R. H. STICKLEY, for plaintiff.

A. J. CALHOUN, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was commenced by Paul Jones & Co., a wholesale liquor concern of Louisville, Ky., to recover the sale price of thirty-five cases of whisky sold to Wilkins and shipped to Memphis. The defense was based on the ground that the liquor was sold to Wilkins in be by him retailed in Shelby county, in violation of the prohibition laws of this State in force in that city. The trial judge and the court of civil appeals have concurred in a denial of a remedy to plaintiff in the suit; and the cause is before us for review on a petition for *certiorari*.

The fundamental principles that must govern the controversy are those announced in the case of *Bank v. Burke*, 135 Tenn., 19, 185 S. W., 704, at this term of court. That case involved the legality of a contract of lease, but the opinion also discussed contracts of sale.

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The general rule is that in case of the sale of intoxicating liquors mere knowledge on the part of the seller that the purchaser intends illegally to resell such liquors will not render the contract void so as to bar the seller's action for the purchase price. *Tracy v. Talmage*, 14 N. Y., 173, 67 Am. Dec., 132; *Anheuser-Busch Brewing Asso. v. Mason*, 44 Minn., 318, 46 N. W., 558 9 L. R. A. 506, 20 Am. St. Rep., 580; *Washington Liquors Co. v. Shaw*, 38 Wash., 398, 80 Pac., 536, 3 Ann. Cas., 153, and note; *Frankel v. Hillier*, 16 N. D., 387, 113 N. W., 1067, 15 Ann. Cas., 265 and note; 9 Cyc. 571.

However, if the seller participates or contributes to the intention of the purchaser to sell in violation of law, or does any act, however slight, to facilitate or in furtherance of the design to transgress, or has an interest therein, the right to recover for the price is lost. The participation in the illegal purpose or act must be in some manner other than the mere act of making the sale. Authorities, *supra*.

We are of opinion that the facts in this case show such a participation on the part of the plaintiff vendor as to bar him of any remedy. The plaintiff knew through its local solicitor in Memphis that Wilkins was running a "wide-open" retail liquor saloon; the solicitor had bought drinks for himself and others over the bar. The shipment represented by the account in suit was not made to Wilkins as consignee, but to the Lewis Transfer Company for delivery—so agreed in order that the public would not know to

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whom it was to be delivered. The cases were not marked with the name of T. B. Wilkins, but with the initials, "T. B. W."

The manager of the vendor company testifies that the shipment to the transfer company as consignee was for the purpose of insuring delivery to Wilkins. We fail to see how that end could have been more safely attained by the marking of the outside of the cases with mere initials, rather than with the name and street address of the purchaser, even though it was desirable thus to use the transfer company.

Where it appeared that the plaintiff, a wholesale liquor dealer, supplied a retailer in another State with intoxicating liquors, and aided the latter by shipping to a fictitious consignee part of the liquors, and by packing other portions so as to conceal their true character, it was held that his account could not be recovered. *Kohn v. Melcher* (C. C.), 43 Fed., 641, 10 L. R. A., 439; *Feineman v. Sachs*, 33 Kan., 621, 7 Pac., 222, 52 Am. St. Rep., 547; *Corbin v. Houlehan*, 100 Me., 246, 61 Atl., 131, 70 L. R. A., 568.

In *Gaylord v. Soragen*, 32 Vt., 110, 76 Am. Dec., 154, it was held that an action by the seller could not be maintained when, at the defendant's request, the plaintiff marked the packages in a peculiar way, omitting the defendant's name so as to enable the defendant with greater facility to save them from seizure.

Particular pertinency is given to these authorities by the fact that we have in this state a statute (Act

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Extra Session 1913, chapter 1) that requires common carriers to cause all consignees of liquors to sign, before delivery of goods, an affidavit setting out his name, address, the fact of consignment to affiant, the use to be made of the liquors, etc. It is manifest that the manipulation resorted to by the plaintiff was to circumvent the object sought to be attained by the legislature in the passage of this act.

· A correct result has been reached in this case. Writ denied.

Hiller v. Crenshaw.

D. M. HILLER v. T. B. CRENSHAW, *Clerk of County Court, et al.*

(*Jackson*. April Term, 1916.)

COMMERCE. "Interstate commerce." Engagement in by liquor dealer. Statute.

Under Acts 1909, chapter 479, section 4, subjecting the occupation of wholesale liquor dealer to a privilege tax, making it a misdemeanor to exercise the privilege without first paying the tax, and section 16, providing that the inhibition of the act shall not apply to any person engaged in interstate commerce, a liquor dealer, who sold to customers out of the State, securing his supply from other dealers in the city, who carried a "borrow and loan" account with such other dealers and in turn supplied them with liquors, thus balancing accounts, but making settlement by cash payment in one case, was doing an intra-state business, and so liable for the tax.

Acts cited and construed: Acts 1909, ch. 479, sec. 4.

Cases cited and approved: *Heyman v. Hays*, 35 Sup. Ct., 403; *Cargill v. Minnesota*, 180 U. S., 452; *Tombeaugh v. State*, 50 Tex. Cr. R., 286; *Ray v. State*, 46 Tex. Cr. R., 176; *Howard v. State*, 72 Tex. Cr. R., 624; *State v. Mitchell*, 156 N. C., 659; *Com. v. Abrams*, 150 Mass., 393; *Brown v. State*, 121 Tenn., 186; *Jones v. State*, 66 So., 987.

Code cited and approved: Sec. 6783 (S.).

FROM SHELBY

Appeal from the Chancery Court of Shelby County.
—FRANCIS FENTRESS, Chancellor.

Hiller v. Crenshaw.

P. M. CANALE and I. H. PERES, for appellant.

R. L. BARTELS, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Hiller filed the bill of complaint in this cause against Crenshaw, clerk of the county court of Shelby county, and Woolen, revenue agent for the State, to enjoin the assessment and collection of privilege taxes about to be assessed in behalf of the county and State, respectively, against complainant as a wholesale liquor dealer. The bill alleged that complainant, while doing business as a wholesale liquor dealer, was so engaged exclusively in carrying on interstate commerce, and had confined his business to sales of liquors to nonresidents of this State.

The defendants answered and denied this allegation, and filed a cross-bill, praying judgment for the privilege taxes. The chancellor held complainant and cross-defendant liable for both privilege taxes. Hiller has appealed and assigned errors.

The statute relied on by the State and county is Act 1909, chapter 479, section 4, which provides that the occupation or business of a wholesale liquor dealer is subject to a privilege tax of \$500, payable to each of the governmental bodies, and defines that persons who sell liquors in quantities of one quart or more are wholesale dealers. It is made a misdemeanor to exercise the privilege without first paying the tax;

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"but this inhibition shall not apply to any person, firm, or corporation engaged in interstate commerce." Section 16.

1. The first contention of the cross-complainants in support of the claim to the taxes is that the doing of an intrastate business is made manifest by the following facts in proof: In the ordinary course of his business, Hiller customarily replenished his stock by purchases made of various liquor dealers in Memphis. He would either telephone for the liquors or order them in person, and they would be delivered at his place of business in bulk; he would break the packages, distribute the stock in his storeroom, and later ship to customers out of the State.

The decision in *Heyman v. Hays*, 35 Sup. Ct., 403, 236 U. S., 178, 59 L. Ed., 527, is relied on by appellant, Hiller. In that case, however, the supreme court of the United States apparently took pains to show that the particular feature here involved was not to be deemed one appearing in that case; that is the replenishing from other dealers located in this State of the stock of Hiller, gathered for shipments to points out of this State. While we think it apparent from the opinion in the *Heyman Case* that the supreme court had this factor (*Cargill v. Minnesota*, 180 U. S., 452, 21 Sup. Ct., 423, 45 L. Ed., 619) in mind, and that it was not touched upon, by way of inclusion in its ruling we are of opinion that the instant case may turn upon another point.

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2. Further proven facts are that, as a customary and substantial feature of his business, appellant carried with other liquor dealers in Memphis what he terms a "borrow and loan account."

Certain liquors, as and when desired by Hiller for his business, were delivered to him by other dealers in Memphis who charged him therefor, and Hiller in turn would enter upon his invoice book or ledger a charge against himself for these liquors. Later on he would credit this charge, when liquors either of like character or different character, but equal in value to those received by him, were returned.

Liquor dealers in Memphis would obtain liquors from Hiller from time to time as they desired, and when they did so Hiller would charge them with the goods delivered to them. When such dealers returned goods of like value (not necessarily the same character of goods), Hiller would credit the party to whom he had previously delivered the liquors. In at least one instance settlement was made by cash payment, and it is a fair inference that such mode of settlement was optional.

The chancellor was warranted in basing his decree on these facts. There was no legitimate emergency that could even tend to justify a lending; the return or compensation was not to be in the same kind of liquor, or necessarily in liquor at all. The service and supplies thus afforded were those that some dealer in due course would have had to furnish but for the lending indicated.

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By legislative pronouncement the laws in relation to illegal sales of liquors "are to be construed liberally, so as to prevent evasions and subterfuges, and to effectuate the objects had in view." Code (Shannon), section 6783.

The trend of the recent decisions is to hold a lending to be a sale in such cases involving the violation of the liquor laws. *Tombeaugh v. State*, 50 Tex. Cr. R., 286, 98 S. W., 1054, 8 L. R. A. (N. S.), 937, 123 Am. St. Rep., 841, 14 Ann. Cas., 275 overruling *Ray v. State* 46 Tex. Cr. R., 176, 79 S. W., 535; followed by *Howard v. State*, 72 Tex. Cr. R., 624, 163 S. W., 429; *State v. Mitchell*, 156 N. C., 659, 72 S. E., 632, 37 L. R. A. (N. S.), 302, Ann. Cas., 1913A, 469; *Com. v. Abrams*, 150 Mass., 393, 23 N. E., 53; *Brown v. State*, 121 Tenn., 186, 114 S. W., 198.

Cases holding to the contrary, such as *Jones v. State* (Miss.), 66 South, 987, L. R. A., 1915C, 648, are not in necessary conflict with what is herein ruled, they being cases where the liquor was to be returned in kind and amount.

Finding the decree of the chancellor to be without error, it is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1915.

T. D. TRAVIS *et al.* v. P. T. SITZ *et al.*

(*Nashville*. December Term, 1915.)

1. HUSBAND AND WIFE. Wife's separate estate. Conveyance creating.

In a conveyance of real estate to a daughter, to take effect after the death of the grantor and his wife, the words "to have and to hold said tract of land to the said L. H. and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry, and not to be liable to be sold for the debts of any husband she may have if she ever marries," created a separate estate, without the aid of a clause restraining alienation. (*Post*, pp. 163-167.)

Cases cited and approved: *Darley v. Darley*, 3 *Atk.*, 399; *Cape v. Cape*, 2 *Y. & C.*, 543; *Lee v. Prideaux*, 3 *Bro. Chy.*, 383; *Tyrrell v. Hope*, 2 *Atk.*, 558; *Prichard v. Ames*, T. & R., 222; *Kirk v. Paulin*, 7 *Vin. Abr.*, 95; *Atcherly v. Vernon*, 10 *Mod.*, 531; *Wagstaff v. Smith*, 9 *Ves.*, 520; *Dixon v. Olmius*, 2 *Cox*, 414; *Simmons v. Horwood*, 1 *Keen*, 9; *Tullett v. Armstrong*,

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1 Beav., 1; Bain v. Lescher, 11 Sim., 397; Margetts v. Barringer, 7 Sim., 482; Gouler v. Camm, DeG., F. & J., 146; Tyler v. Lake, 2 R. & M., 188; Powell v. Powell, 28 Tenn., 477; Barnum v. Le Master, 110 Tenn., 638; Williford v. Phelan, 120 Tenn., 589; Mitchell v. Bank, 126 Tenn., 669; Hamilton v. Bishop, 16 Tenn., 33; Beaufort v. Collier, 25 Tenn., 487; Loftus v. Penn, 31 Tenn., 445; Gardenhire v. Hinds, 38 Tenn., 402; Pearson v. Davis, 48 Tenn., 593; Eaves v. Gillespie, 31 Tenn., 128; Woods v. Sullivan, 1 Swan, 507; Houston v. Embry, 33 Tenn., 480; Meredith v. Owen, 36 Tenn., 223; Baggett v. Meux, 1 Coll., 138; Stogdon v. Lee, 1 Q. B., 661; Molloy v. Clapp, 70 Tenn., 586; Wood v. Polk, 59 Tenn., 220.

Cases cited and distinguished: Grotenkemper v. Carver, 77 Tenn., 280; Young v. Young, 56 N. C., 216; Martin v. Bell, 9 Rich. Eq. (S. C.), 42.

- 2. HUSBAND AND WIFE. Wife's separate estate. Statute.** Shannon's Code, sections 4234, 4235, providing that there can be no dispossession of the husband or wife on a sale under execution of the husband's interest in the wife's general real estate during the life of the wife, that it cannot during her life be aliened by the husband, and Acts 1879, chapter 141, reducing the husband's rights of curtesy in the wife's land, have no bearing on the inferences to be drawn from the language of a deed showing an intention to create a separate estate in the wife. (*Post*, pp. 167-169.)

Acts cited and construed: Acts 1879, ch. 141.

Cases cited and approved: Coleman v. Satterfield, 39 Tenn., 259; Lucas v. Rickerich, 69 Tenn., 728; Garth & Buckman v. Fort, 83 Tenn., 683; Key v. Snow, 90 Tenn., 663; McCallum v. Petigrew, 57 Tenn., 394; Corley v. Corley, 67 Tenn., 7; Bryant v. Freeman, 131 Tenn., 87; Parlow v. Turner, 132 Tenn., 339; Ables v. Ables, 86 Tenn., 333; Price v. Planters' Nat. Bank, 92 Va., 468.

Codes cited and construed: Secs. 4234, 4235 (S.).

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3. HUSBAND AND WIFE. Wife's separate estate. Necessity of trustee.

A trustee is not essential to the creation of a separate estate. (*Post*, p. 169.)

Case cited and distinguished: *Hamilton v. Bishop*, 16 Tenn., 33.

4. HUSBAND AND WIFE. Separate estate. Property of wife at time of marriage.

Although property may be given to a woman to her sole and separate use while she is single, and not in contemplation of any particular intended marriage, the peculiar properties of the separate estate did not and cannot exist until she is married. (*Post*, p. 169.)

5. PERPETUITIES. Restraint on alienation. Wife's separate estate.

A deed to a daughter, creating a separate estate, providing that the land was given without power of disposal in any way, and not to be liable to be sold for her debts, or the debts or liabilities of any husband, was not invalid as a restraint on alienation. (*Post*, pp. 169-171.)

Cases cited and approved: *Clive v. Carew*, 1 John. & Hem., 199; *Sheriff v. Butler*, 12 Jur. (N. S.), 329; *Lady Bateman v. Faber*, 67 L. J. Ch., 130; *Stanley v. Stanley*, 7 Ch. Div., 589; *Richards v. Chambers*, 10 Ves., 580; *Tullett v. Armstrong*, 4 Myl. & Cr., 377; *Hauser v. St. Louis*, 170 Fed., 906.

Case cited and distinguished: *Baggett v. Meux*, 1 Coll., 138-153.

6. HUSBAND AND WIFE. Wife's separate estate. Statute.

Acts 1913, chapter 26, removing the disabilities of coverture in respect of married women, and practically making their estates separate, does not interfere with or disturb the creation or operation of equitable separate estates, since the removal by the statute of the wife's disabilities increased rather than diminished the necessity for such estates. (*Post*, pp. 171-177.)

Acts cited and construed: Acts 1913, ch. 26.

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Cases cited and approved: Pooley v. Webb, 43 Tenn., 599; Young v. Young, 47 Tenn., 461; Hix v. Gosling, 69 Tenn., 560; Eckerly v. McGhee, 85 Tenn., 664; Webster v. Helm, 93 Tenn., 322; Bank v. James, 95 Tenn., 8; Robinson v. Queen, 87 Tenn., 445; Musson v. Trigg, 51 Miss., 172; Hooks v. Brown, 62 Ala., 258; Holliday v. Hively, 198 Pa., 342.

Cases cited and distinguished: MacConnell v. Lindsay, 131 Pa., 476; Hays v. Leonard, 155 Pa., 474.

7. EQUITY. Bill of review. Right to file. Minors.

A minor may file an original bill in the nature of a bill of review to question matters adjudged against him. (*Post*, pp. 177, 178.)

Cases cited and approved: Livingston v. Noe, 69 Tenn., 63; McCown v. Moores, 80 Tenn., 635; Winchester v. Winchester, 38 Tenn., 460; Anderson v. Ammonett, 77 Tenn., 1; Greenlaw v. Greenlaw, 84 Tenn., 435; Wilson v. Schaefer, 107 Tenn., 300; Stephens v. Porter, 58 Tenn., 341; Puckett v. Wynns, 132 Tenn., 513.

8. EQUITY. Bill of review. Collateral attack. Innocent purchaser.

The rights of an innocent purchaser under a decree could not be interfered with, either by a bill of review for error apparent or an original bill in the nature of a bill of review. (*Post*, pp. 177, 178.)

9. DEEDS. Rights of heirs. Separate estate of wife.

Under a deed creating a separate estate in a wife, her children could have no interest, save as her heirs at law. (*Post*, pp. 178, 179.)

Cases cited and approved: Hix v. Gosling, 69 Tenn., 560; Old Folk's Society v. Millard, 86 Tenn., 657.

10. HUSBAND AND WIFE. Wife's separate estate. Restraint on alienation. Power of court.

Where a bill was filed by the husband and wife in substantially an *ex parte* proceeding for the purpose of obtaining leave of the chancellor to violate a clause restraining alienation in a deed creating a separate estate in the wife, the chancellor was with-

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out jurisdiction of the subject-matter, and his decree was inoperative. (*Post*, pp. 178, 179.)

11. JUDGMENT. Collusive decree. Effect.

A collusive decree between husband and wife can be treated, as to third parties, only as a deed between them. (*Post*, pp. 178, 179.)

12. JUDGMENT. Collusive decree. Construction of deed.

A collusive decree, obtained by a husband and wife concerning the validity of a deed, or of any clause thereof, filed against persons who on the face of the bill had no interest in the controversy, will be treated as to third persons only as a deed between the husband and wife. (*Post*, pp. 178, 179.)

13. ABATEMENT AND REVIVAL. Other action pending. Ground for demurrer.

To recover land conveyed in violation of a restraint on alienation, pendency of a prior suit on the same matter would not be ground of demurrer, but for motion to elect. (*Post*, pp. 179, 180.)

Case cited and approved: *Clark v. Garrett*, 74 Tenn., 262.

14. ABATEMENT AND REVIVAL. Grounds Other action pending.

Pendency of a prior suit will not be ground for a plea in abatement, where the bill states that the record in the old case has been lost and cannot be found. (*Post*, pp. 179, 189.)

15. HUSBAND AND WIFE. Separate estate of wife. Conveyance.

The rule that a married woman will not be permitted in a court of equity to disaffirm a voidable sale made by her, the consideration of which has been paid directly to her, except on condition that she refund the purchase money, or that it be declared a lien on the property, does not apply where the sale has been made in violation of a restraint on alienation. (*Post*, pp. 180-182.)

Cases cited and approved: *Bradshaw v. Van Valkenburg*, 97 Tenn., 316; *Cox v. Building & Loan Association*, 101 Tenn., 490; *Harris v. Smith*, 98 Tenn., 286; *Pilcher v. Smith*, 39 Tenn., 208; *Aiken*

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v. Suttle, 72 Tenn., 103; Bank v. James, 95 Tenn., 8; Richards v. Chambers, 10 Ves., 580.

16. HUSBAND AND WIFE. Separate estate of wife. Conveyance.

Where a married woman disaffirms a sale made by her of her separate estate, voidable because of a restraint on alienation, she may recover such rents accruing from the date when she surrendered possession. (*Post*, pp. 182, 183.)

Cases cited and approved: Rowan v. Riley, 65 Tenn., 67; Smith v. Heirs, etc., of Thomas, 83 Tenn., 324; Combs v. Combs, 131 Tenn., 66.

17. DESCENT AND DISTRIBUTION. Right of heirs. Wife's separate estate.

Where a sale by a married woman of property constituting her separate estate is void because of a restraint on alienation, although her heirs at law cannot recover rents accruing before her death, in the absence of a tenancy by curtesy in the surviving husband, they could recover for rents not in arrears at her death. (*Post*, pp. 182, 183.)

18. CURTESY. Requisites. Wife's separate estate.

Where there was no language, in a deed creating a separate estate, cutting off the husband's marital rights beyond the death of the wife, which intention must be clearly expressed, all the elements of a tenancy by curtesy existing, marriage, birth of issue capable of inheriting, seisin in the wife, and death of the wife, the husband was entitled to a tenancy by curtesy. (*Post*, pp. 183, 184.)

Cases cited and approved: Carter v. Dale, 71 Tenn., 710; Frazer v. Hightower, 59 Tenn., 94; Bingham v. Weller, 113 Tenn., 70; Monroe v. Van Meter, 100 Ill., 347.

19. CURTESY. Wife's separate estate. Construction of deed.

Under Shannon's Code, section 3672, making the use of the words "heirs and assigns" unnecessary, the failure to use the word "assings," in a deed conveying a separate estate and imposing

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a restraint on alienation, would not defeat the surviving husband's right to a tenancy by curtesy. (*Post*, pp. 184, 185.)

Cases cited and approved: *Teague v. Sowder*, 121 Tenn., 132; *Kendall v. Clapp*, 163 Mass., 69; *Goetz v. Ballou*, 64 Hun, 490; *Johnson v. Morton*, 28 Tex. Civ. App. 296.

Code cited and construed: Sec. 3672 (S.).

20. **CURTESY. Wife's separate estate. Construction of deed.**

The words "and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry," in a deed creating a separate estate in a wife, did not by the use of the word "heirs" import a purpose to cut off a right to a tenancy by curtesy in the surviving husband. (*Post*, p. 185.)

Case cited and approved: *Templeton v. Twitty*, 88 Tenn., 595.

21. **CURTESY. Requisites. Release by death of issue.**

Where all the requisites of a tenancy by curtesy have existed, the husband is entitled to curtesy on surviving his wife, although all issue have died. (*Post*, pp. 185, 186.)

 FROM FRANKLIN

Appeal from the Chancery Court of Franklin County.—V. C. ALLEN, Chancellor.

FLOYD ESTILL, FRANK LYNCH and FÉLIX LYNCH, for appellants.

ROBINSON & FANCHER, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The first question for determination is whether the following instrument created a separate estate in Laura Hudgins:

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"For the love and affection I have for my daughter Laura Hudgins, I, James A. Hudgins, do hereby transfer and convey unto my said daughter Laura Hudgins, to take effect, and with the restrictions hereinafter, a tract of land situated in civil district No. 2, Franklin county, Tennessee. . . . To have and to hold said tract of land to the said Laura Hudgins and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry. . . .

But this deed is not to take effect until the death of my wife, and my death, as the use of the place during my life, and the life of my wife, Elizabeth Hudgins, is herein and hereby expressly reserved. My clear intention is to give the said land to my daughter Laura Hudgins at the death of my wife and myself, without power of disposal in any way, and not to be liable to be sold for her debts, or the debts or liabilities of any husband she may have if she ever marries. This 4th day of October, 1879."

We are of the opinion that a separate estate was created by the words:

"To have and to hold said tract of land to the said Laura Hudgins and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry, . . . and not to be liable to be sold for . . . the debts or liabilities of any husband she may have if she ever marries."

We have in this State no direct authority in any published case, but in the second volume of King's Digest, p. 1275, section 68, there is a reference to an

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unreported decision, *Blackwell v. Blackwell*, rendered at Brownsville in 1869, which seems to be authority on the point. In that case the conveyance contained the clause:

“None of the property shall ever be subject to the debts of the husband, and that the husband be permitted, during the joint lives of himself and wife, to use, control, work, manage, and direct all the said property as he may judge best, receiving and applying the earnings, proceeds, and profits to the joint use and benefit of himself and wife, for the support, maintenance, and education of the issues of the intended marriage, if any there be.”

It was held, according to Mr. King’s report of the case, that this language created a separate estate in the wife as to the *corpus*, and a joint estate as to the income and earnings.

In *Grotenkemper v. Carver*, 9 Lea (77 Tenn.), 280, the language of the instrument was:

“To her sole and separate use, and to be held by her free from the debts, liabilities, and contracts of her present husband, William H. Carver, or any future husband she may have.”

The court said that the words “to her sole and separate use” were sufficient to create a separate estate, and that the residue of the sentence, through being in accordance with an established legal usage, “was intended to make assurance doubly sure, by expressing the grantor’s object in a different form.” The same form, substantially, appears in *Molloy v. Clapp*,

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2 Lea (70 Tenn.), 586, and *Wood v. Polk*, 12 Heisk. (59 Tenn.), 220; but these cases went off on other points.

The precise point, however, arose in *Young v. Young*, 56 N. C., 216, 219. The language there considered was, immediately following the bequest of a slave to testator's married daughter Anna Young:

"And not to be subject to any debt or debts which Jesse Young may contract, or may have contracted."

The court said:

"Here is a plain and manifest intention on the part of the donor that the slave Mariah shall be for the sole and separate use of the wife and her children. The husband, Mr. Young, has no interest in the slave."

To the same effect is *Martin v. Bell*, 9 Rich. Eq. (S. C.), 42, 70 Am. Dec., 200. The language there under examination was:

"The property, real or personal, that my three daughters (naming them) may or do receive by this my will, I hereby settle it on them and the lawful issue of their bodies forever, and I do declare that it shall in no wise be subject to the debts of their husbands, in no case whatsoever."

It was held the daughters took separate estates.

The matter for ascertainment in all cases of this nature is whether it was the intention of the settler to exclude the husband. In addition to the words, to the "sole and separate use" of the wife, which are universally held to create a separate estate, the fol-

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lowing have in England been held sufficient evidence of the purpose, namely:

"For her livelihood," *Darley v. Darley*, 3 Atk., 399; *Cape v. Cape*, 2 Y & C., 543; *Lee v. Prideaux*, 3 Bro. Chy., 383; "That she may receive and enjoy the profits," *Tyrrell v. Hope*, 2 Atk., 558; "to be at her own disposal, *Prichard v. Ames*, T. & R., 222; *Kirk v. Paulin*, 7 Vin. Abr., 95; "to be by her laid out as she shall think fit." *Atcherly v. Vernon*, 10 Mod., 531; "for her own use independant of the husband," *Wagstaff v. Smith*, 9 Ves., 520; *Dixon v. Olmius*, 2 Cox, 414; *Simmons v. Horwood*, 1 Keen, 9; *Tullett v. Armstrong*, 1 Beav., 1; "not subject to his control," *Bain v. Lescher*, 11 Sim., 397; "to her own use and benefit independent of any other person," *Margetts v. Barringer*, 7 Sim., 482; "to receive the rents while she lives, whether married or single," *Goulder v. Camm*, De G., F. & J., 146; "her receipt to be a sufficient discharge," *Lee v. Prideaux*, 3 Bro. Chy., 381, 382; *Tyler v. Lake*, 2 R. & M., 188; "to be delivered to her on demand," *Dixon v. Olmius*, 2 Cox, 414.

We have, in our Reports, many cases on the subject. The few which we cite will perhaps give a fair general view of our law, in respect of the matter, in its varied aspects. *Powell v. Powell*, 9 Humph. (28 Tenn.), 477; *Barnum v. LeMaster*, 110 Tenn., 638, 75 S. W., 1045, 69 L. R. A., 353; *Williford v. Phelan*, 120 Tenn., 589, 113 S. W., 365; *Mitchell v. Bank*, 126 Tenn., 669, 150 S. W. 1141; *Hamilton v. Bishop*, 8 Yerg. (16 Tenn.), 33, 29 Am. Dec., 101; *Beauford v. Collier*, 6

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Humph. (25 Tenn.), 487, 44 Am. Dec., 321; *Loftus v. Penn*, 1 Swan (31 Tenn.), 445; *Gardenhire v. Hinds*, 1 Head (38 Tenn.), 402; *Pearson v. Davis*, 1 Heisk. (48 Tenn.), 593; *Eaves v. Gillespie*, 1 Swan (31 Tenn.) 128; *Woods v. Sullivan*, 1 Swan, 507; *Houston v. Embry*, 1 Sneed (33 Tenn.), 480; *Meredith v. Owen*, 4 Sneed (36 Tenn.), 223.

It may be said of the language in the deed now before us that it is difficult to conceive of the husband (without the intervention of some form of trust) owning property which is not at all liable for his debts, nor subject to his contractual powers. So by exclusion of the legal incidents that attend the right of property it is clear on principle that the language could have no other meaning than an intention to exclude the husband.

We do not think any strength is added to this conclusion by the clause restraining alienation, as insisted by learned counsel. *Baggett v. Meux*, 1 Coll., 138; *Tullett v. Armstrong*, 1 Beav., 1; *Stogdon v. Lee*, 1 Q. B., 661. In the case last cited it is said that to infer the existence of a separate estate from the mere fact of a restraint on alienation would result in the plainly unsound conclusion that that which is a mere accessory to the separate use, for the purpose of rendering it effectual, ought, standing alone, to compel an implication of that separate use to which it is only an accessory.

Before leaving this branch of the case, it is well to note a question debated at the bar and in the briefs;

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that is, whether our act of 1849-50 (Shannon's Code, sections 4234, 4235) has any bearing on the controversy. The substance of that statute, as construed by our cases, is that, not only can there be no dispossession of the husband and wife, or either of them, on a sale under execution of the husband's interest in the wife's general real estate, during the life of the wife, but it cannot during her life be aliened by the husband voluntarily in such way as to dispossess her, or, if dispossessed, she may recover possession by suit through a next friend, making her husband a defendant. *Coleman v. Satterfield*, 2 Head, 259, 264, 265; *Lucas v. Rickerich*, 1 Lea (Tenn.), 728; *Garth and Buckman v. Fort*, 15 Lea (83 Tenn.), 683, 687, 688; *Key v. Snow*, 90 Tenn., 663, 18 S. W., 251; *McCallum v. Petigrew*, 10 Heisk. (57 Tenn.), 394; *Corley v. Corley*, 8 Baxt. (67 Tenn.), 7; *Bryant v. Freeman*, 131 Tenn., 87, 173 S. W., 863, L. R. A., 1915D, 996. By Acts 1879, chapter 141, the rights of the husband in the wife's land, as tenant by the courtesy initiate, were so reduced that he was left only the privilege of renting out the land as governor of the family, and of collecting the rents for the benefit of the family. *Parlow v. Turner*, 132 Tenn., 339, 347, 178, S. W., 766; *Ables v. Ables*, 86 Tenn., 333, 9 S. W., 692. Would the meager nature of the husband's interest have any bearing on the inferences to be drawn from the language of the deed in question, which we have just held showed an intention to create a separate estate in the wife? It would not.

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In the discovery and determination of a purpose to create a separate estate, the inquiry is not necessarily confined to property in which the husband would have an interest, but for the existence of such separate estate. *Price v. Planters' Nat. Bank*, 92 Va., 468, 23 S. E., 887, 32 L. R. A., 214.

We may add that a trustee is not essential to the creation of a separate estate (*Hamilton v. Bishop*, 8 Geog. [16 Tenn.], 33, 42, 29 Am. Dec., 101), and that—"property may be given to a woman to her sole and separate use while she is single, and not in contemplation of any particular intended marriage and the gift is valid in that form but the peculiar properties of the separate estate do not and cannot exist until she is married." 3 Pom. Eq. Jur. (3d Ed.), section 1109.

The restraint on alienation contained in the deed to Laura Hudgins was valid. *Baggett v. Meux*, 1 Coll., 138—153, 1 Phill., 627; *Clive v. Carew*, 1 John. & Hem., 199, 70 Eng. Reprint, 719; *Sheriff v. Butler*, 12 Jur. (N. S.), 329; *Lady Bateman v. Faber*, 67 L. J. Ch., 130, 1 Chy., 144; *Stanley v. Stanley*, 7 Ch. Div., 589; *Richards v. Chambers*, 10 Ves., 580.

In *Baggett v. Meux*, supra, the testator, having created a separate estate in his daughters, used with respect thereto the following language:

"I hereby declare that neither of my said daughters shall sell, mortgage, charge, or incumber the estates or property by me given, devised and bequeathed to them."

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This was held a valid restriction.

“Now, it being clear and admitted on all hands,” said the vice chancellor, “that with respect to a life interest given to a married woman for her separate use she may be effectually restrained from doing, during coverture, any act of alienation, total or partial (without any clause of forfeiture, and without any limitation over taking effect upon such an act), it being clear, as I apprehend, that a clause prohibiting alienation, or anticipation by a married woman of her separate estate (when there is no such provision of forfeiture or limitation over), however the prohibition may be expressed, whether in terms confining it to a period of coverture, or in terms general and undefined, or in terms distinctly expressing a period beyond as well as during coverture, has by law validity allowed to it, as to a life interest, at least, but that this validity is by the same law (whatever the expressions), not permitted to extend to a period beyond coverture (that is the law of its own force, preventing the restriction from operation or effect as to any act done when coverture does not exist), . . . I am at a loss to discover any sufficient reason why that which holds good as to a life interest should not equally hold good as to an absolute estate. Why should there be any difference?”

This was subsequently affirmed in 1 Phill., 627, the Lord Chancellor saying:

“The object of the doctrine” establishing separate estates “was to give to married women the enjoyment

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of property independent of the husband; but to secure that object it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independant of the trust for separate use, may be different in real estate from what it is in personal; but a court of equity, having created in both a new species of estate, may in both cases modify the incidents of that estate."

And see the great case of *Tullett v. Armstrong*, 4 Myl. & Cr. 377, in which the subject was fully discussed by Lord Chancellor Cottenham.

The validity of the restraint on alienation in such cases has been recognized in this country in several States, Arkansas, Florida, Georgia, Kentucky, North Carolina, South Carolina, Texas, Virginia, and West Virginia, and in the federal courts. See *Hauser v. St. Louis*, 170 Fed., 906, 96 C. C. A., 82, 28 L. R. A. (N. S.), 426, and note.

In this State we have perhaps no direct decision on the point, but the principle is clearly recognized in *Pooley v. Webb*, 3 Cold. (43 Tenn.), 599; *Young v. Young*, 7 Cold. (47 Tenn.), 461, 476; *Hix v. Goslin*, 1 Lea (69 Tenn.), 560; *Eckerly v. McGhee*, 85 Tenn., 644, 4 S. W., 386; *Webster v. Helm*, 93 Tenn., 322, 24 S. W., 488; *Bank v. James*, 95 Tenn., 8, 30 S. W., 1038. And see *Robinson v. Queen*, 87 Tenn., 445, 11 S. W., 38, 3 L. R. A., 214, 10 Am. St. Rep., 690, where our statute is referred to, which also recognizes the prin-

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ciple. Before passing from this branch of the case, it may be proper to note, in view of our Acts 1913, chapter 26, removing the disabilities of coverture in respect of married women, and practically making their estate separate, that under the authorities such acts do not interfere with or disturb the creation or operation of the equitable separate estate so long and so beneficially enforced and protected in courts of chancery; and therefore parents and others, desiring to provide for wives or children, may, by restraints on alienation in such settlements, still throw around them the safeguards devised by the wisdom of the great equity judges. *Musson v. Trigg*, 51 Miss., 172, 182-184; *Hooks v. Brown*, 62 Ala., 258; *MacConnell v. Lindsay*, 131 Pa., 476, 19 Atl., 306; *Hays v. Leonard*, 155 Pa., 474, 26 Atl., 664; *Holliday v. Hiveley*, 198 Pa., 342, 47 Atl., 988. And as to the necessity for such protection we cannot refrain from quoting the following from *MacConnell v. Lindsey*, supra:

“Neither has the act of 1848, or the act of 1887, nor both of them together, dispensed with the necessity which originally gave rise to this equity. Heretofore a married woman was protected from her own improvidence, as well as the improvidence of her husband, by her disabilities; and, as these disabilities are now to a great extent removed, the necessity is increased, rather than diminished. Her disabilities, her want of power to yield to her husband’s solicitations, or to give way to her own sympathies, have always been supposed to afford her the highest pro-

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tection. Complete protection, as the law now stands, therefore, is found only in a trust for her separate use."

As said in *Hays v. Leonard*, supra:

"An act of assembly cannot prevent the wife from yielding to over-persuasion or coercion. It can declare that her estate shall not be incumbered or conveyed by her husband or seized for his debts, but so long as she has the power to incumber or to convey she may be plied with entreaty, or argument, or threats, until her will is overcome and her property incumbered or lost. To protect her from herself the separate use trust has an important place to fill, and has not been rendered useless by the legislation referred to."

The remaining questions arise out of the facts now to be stated:

Laura Hudgins intermarried with one Sanders, by whom she had four children, three of whom are still living. After the death of Sanders she intermarried with the defendant P. T. Sitz, who survived her. By this last marriage she had one child, Turney Sitz, who also survived his mother. James A. Hudgins and his wife, the parents of Laura Hudgins, died prior to the intermarriage of Laura and the said P. T. Sitz. On February 28, 1901, Sitz and wife filed their bill in the chancery court of Franklin county against her children by the Sanders marriage for the purpose of having the restraint on alienation in the above-mentioned deed declared void, because repug-

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nant to the estate granted. The bill in that case charged that the deed conveyed an absolute estate in fee simple; that the clause in restraint of alienation was repugnant thereto, and hence void. The defendants were all minors and nonresidents. Publication was made for them, however, and a guardian *ad litem* appointed, who filed an answer insisting that Laura Sitz, the mother of the defendants to that bill, had only a life estate and possessed no power or right to have the land sold. The chancellor rendered a decree declaring the clause in question repugnant to the granting clause, and void, and that Sitz and wife had the right to dispose of the land as fully as if the restraining clause had never been written into the deed. Subsequently Sitz and wife executed a deed in trust on the land to J. R. Clark, trustee, to secure the Union Central Life Insurance Company for a loan of \$1,000. Later Sitz and wife attempted to convey the land to one P. A. Shadow, a defendant in the present proceeding, for the consideration of \$3,000, \$2,000 of which was paid in cash, and the remaining \$1,000 by Shadow's assumption of the debt due the insurance company. This deed was executed on August 21, 1903. On April 2, 1904, Shadow executed a mortgage on the land to the same trustee Clark, to secure a loan of \$2,000 made to him by the same insurance company. On January 13, 1906, Mrs. Laura Sitz died. On August 27, 1906, the present complainants, being all of the children of Mrs. Sitz by both marriages, brought their suit in equity to re-

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cover the land as heirs at law of Mrs. Sitz. After that suit was brought Shadow conveyed the land to defendant J. H. Collins for the consideration of \$7,000, of which \$1,000 was paid in cash, \$3,000 by the assumption of the mortgage debts, and the residue in equal installments, payable during the years 1910, 1912, and 1913. That bill was filed for the purpose of reviewing the former decree concerning the invalidity of the clause in restraint of alienation. That bill never came to a hearing, was pending when the present bill was filed, but the record was lost, and could not be found. The present bill was filed June 3, 1911. This bill recites the matters previously stated, avers the validity of the the restraining clause in the Hudgins deed, attacks the decree of the chancery court declaring that clause void, charges that the decree itself was void, on the ground that the court had no power to make it, but, if not void, sought to have it reviewed and set aside. The bill alleged the ages of the complainants as follows: Lizzie Travis (formerly Sanders), twenty-three; Mattie Ray (formerly Sanders), twenty; Willia Sanders, eighteen and that Turney Sitz was a minor of tender years, all of which was sustained by the evidence. The defendants filed a demurrer to the bill, which was sustained by the chancellor, but on appeal to the court of civil appeals that decree was reversed, and the cause remanded for answer and a hearing on the merits. Defendant Collins answered, admitting in substance the allegations of the bill so far as we

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have recited them, but denying the validity of the clause in the deed against alienation, or any error in the decree in respect thereof; averring that the proceeding was instituted at the instance of Mrs. Sitz, that the consideration paid by Shadow was a fair one, that it was paid directly to Mrs. Sitz, and that the deed to Shadow was made according to her own will and wish; averring that defendant Collins had paid to Shadow all of the consideration promised except \$1,000; pleading that he (Collins) is a *bona fide* purchaser of the land, without notice of any coercion practiced by Sitz upon his wife, if any such was practiced; that the bill filed by complainants on August 27, 1906, against Shadow had been abandoned when he (Collins) purchased from Shadow; that the complainants were estopped by the fact that their mother, Laura Sitz, had filed the bill of February 28, 1901, making the allegations contained therein, and that such proceedings were had in that cause as that the clause against alienation was declared void, and that she took an absolute estate under the deed, and by the fact that she and her husband executed the mortgage to the insurance company, and made the deed to Shadow; that "respondent relied upon, and acted upon, the conduct of the said Laura Hudgins Sitz, in filing said bill and procuring said decree, as well as her conduct in the execution of said mortgage to the Union Central Life Insurance Company, and the convenience to P. A. Shadow; and respondent is advised and avers that her conduct in that behalf estops her,

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and those claiming under her, and respondent pleads it as an estoppel;" that at all events, P. T. Sitz, having survived his wife, and there having been a child of the marriage, he was entitled to an estate by the curtesy in the land, and this estate, if no more, passed to defendant Collins by the deed which Shadow made to him. P. A. Shadow filed an answer containing the same defenses. P. T. Sitz filed an answer in full accord with the answers just referred to.

The evidence fails to show that Mrs. Sitz was coerced into filing the bill to have the clause against alienation declared void, or into subsequently mortgaging the land to the insurance company, or into thereafter selling the land to defendant Shadow; but it also fails to show that she received the money arising from the loan. The weight of the evidence is to the effect that Sitz himself received the money borrowed from the insurance company. The \$2,000 purchase money arising from the sale to Shadow was paid by his check, which was received and indorsed by Mrs. Sitz. The evidence fails to show that the price paid by Shadow was, at the time, a full and fair price for the tract.

The bill in the present case is in substance and legal effect an original bill in the nature of a bill of review. That such a bill may be filed by minors to question matters adjudged against them is well settled. *Livingston v. Noe*, 1 Lea (69 Tenn.), 63, 64; *McCoun v. Moores*, 12 Lea (80 Tenn.), 635, 637, *et seq.*

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But, whether treated as an original bill in the nature of a bill of review or simply as a bill of review for error apparent, the rights of innocent purchaser under a decree could not thereby be interfered with. *Winchester v. Winchester*, 1 Head (38 Tenn.), 460, 500; *Livingston v. Noe*, 1 Lea (69 Miss.), 55, 66; *Anderson v. Ammonett*, 9 Lea (77 Tenn.), 1, 11-13; *Greenlaw v. Greenlaw*, 16 Lea (84 Tenn.), 435, 441; *Wilson v. Schaefer*, 107 Tenn., 300 and 330, *et seq.*, 64 S. W., 208. And see *Stephens v. Porter*, 11 Heisk. (58 Tenn.), 341, 344, and *Puckett v. Wynns*, 132 Tenn., 513, 522 *et seq.*, 178 S. W., 1184.

But although the defense of innocent purchaser was made in the answers, yet little evidence seems to have been submitted thereon, except the fact that Shadow had paid \$2,000 of the purchase money to Mrs. Sitz; nor is there any error assigned under that defense, the parties appearing to have proceeded in the actual conduct of the case as if the question were a matter of original litigation on the merits of the clause in restraint of alienation. Nor are we prepared to say that they did not act correctly in so doing, since under the deed the children of Mrs. Sitz had no interest, and could have none save as her heirs at law. The bill, then, filed by Sitz and wife, was in substance an *ex parte* proceeding to obtain the opinion of the chancellor as to the validity of the restraining clause. If it had been filed directly for the purpose of obtaining leave of the chancellor to violate that clause, he would have been without jurisdiction

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of the subject-matter, and his decree would have been inoperative. *Hix v. Gosling*, 1 Lea (69 Tenn.), 560. So a collusive decree between husband and wife can be treated, as to third parties, only as a deed between them. *Old Folks' Society v. Millard*, 86 Tenn., 657, 8 S. W., 851. The same would be true of a decree obtained by husband and wife concerning the validity of a deed, or any clause thereof, filed against persons who on the face of the bill had no interest in the controversy.

The errors assigned by the defendants are that the court of civil appeals erred (1) in overruling the demurrer to the bill; (2) in holding that the decree in restraint of alienation was valid; (3) in holding that Collins was not entitled to restitution of the purchase money paid by Shadow to Mrs. Sitz for the land in controversy.

The case was first before the court of civil appeals on bill and demurrer. That court overruled the demurrer, and remanded the case to the chancellor for answer and further proceedings. That decree was not questioned in the supreme court by *certiorari*, and so the case went back for trial. It was then tried in the chancery court, a final decree rendered, an appeal prayed again to the court of civil appeals, a decree by that court, and the cause was then brought to this court. Now, assuming, without deciding, that this court could; under such a state of the record, review the action of the court of civil appeals on the demurrer, we say that the only point relied on in the brief ac-

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companying the assignment of errors is the pendency of a prior suit on the same matter. That would not be ground of demurrer, but for a motion to elect. The authority cited to sustain the ground of demurrer stated (*Clark v. Garrett*, 6 Lea, 262) does not sustain the point, although there is an erroneous statement to that effect in the syllabus. However, there can be nothing in the suggestion, because the bill states that the record in the old case had been lost and could not be found.

The point contained in the defendants' second assignment of error, as to the validity of the clause restraining alienation, the commanding question in the case, is disposed of in the outset of this opinion.

The third of defendants' assignments will now be considered.

The general rule undoubtedly is that a married woman will not be permitted, in a court of equity, to disaffirm a voidable sale made by her, the consideration of which has been paid directly to her, except on condition that she refund the purchase money, or that it be declared a lien upon the property. *Bradshaw v. Van Valkenburg*, 97 Tenn., 316, 323, 37 S. W., 88; *Cox v. Building & Loan Association*, 101 Tenn., 490, 48 S. W., 226; *Harris v. Smith*, 98 Tenn., 286, 39 S. W., 343; *Pilcher v. Smith*, 2 Head. (39 Tenn.), 208; *Aiken v. Suttle*, 4 Lea (72 Tenn.), 103. This rule, however, does not apply where the sale has been made in violation of a clause in restraint of alienation, and the reason is that the imposition of such a condition

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would render the clause nugatory, destroy the settlement, and so set at naught the purpose of the settler in creating it. *Bank v. Jones*, 95 Tenn., 8, 30 S. W., 1038; *Sheriff v. Butler*, supra; *Lady Bateman v. Faber*, supra; *Stanley v. Stanley*, supra; *Clive v. Carew*, supra. And see *Richards v. Chambers*, 10 Ves., 580, on the general principle.

It may be found useful to refer more particularly to one or two of these English cases. In *Sheriff v. Butler*, the facts were that a trustee, holding in trust certain old bank shares under a marriage settlement, accepted an allotment of new shares in the same bank, which afterwards failed. The settlement contained a clause against anticipation. The *cestui que trust*, a married woman, urged the trustee to take the new shares, and she herself sent to the bank the form filled up by him. In the suit a call as to the old shares was directed to be paid out of the trust estate, but as to the new shares it was held the trustee could not be indemnified. In *Stanley v. Stanley*, the case was this: A wife, having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage upon the property, concealing the restraint on anticipation. The mortgagee, having discovered the fraud, obtained from the married woman a warrant of attorney, entered up judgment thereon, and afterwards obtained a charging order on a dividend due to her the very day it became due. It was held that this was a mere device to make her future income a security for

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the mortgage debt, and an attempt to do indirectly what could not be done directly, and that such charging order must be discharged, because in no case and by no device could the restraint on anticipation be evaded. And so in *Lady Bateman v. Faber* it was held that the doctrine of estoppel could not be so used as to enable a married woman to deprive herself of income settled to her separate use with a restraint on anticipation; that she could not by an admission raise an estoppel against herself so as to bind her interest.

The defendants' third assignment must, for the reasons stated, be overruled. To sustain it would be but the approval of a device for the evasion of the restraint on alienation.

Next in order is the complainants' assignment to the effect that the court of civil appeals erred in refusing to give complainants a recovery for the rents which accrued from the date of the conveyance to Shadow down to the death of Mrs. Sitz, their mother, if the court should be of opinion that an estate by the curtesy survived in Sitz, and, if not, then all rents that accrued from the date when Sitz and wife surrendered possession. If Mrs. Sitz were suing, we are unable to see how, on the principles already stated, a recovery could be denied her; but she is dead, and her administrator is not before the court. Complainants, suing merely as heirs at law, cannot recover rents that became due to the decedent. However, laying out of view the existence of a tenancy by

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the curtesy in the surviving husband, they could recover for rents not in arrears at her death. *Rowan v. Riley*, 6 Baxt. (65 Tenn.), 67; *Smith v. Heirs, etc., of Thomas*, 14 Lea (83 Tenn.), 324; *Combs v. Combs*, 131 Tenn., 66, 173 S. W., 441.

This brings us to the question whether the court of civil appeals erred in holding that P. T. Sitz was entitled to a tenancy by the curtesy. In this we are of the opinion there was no error. All of the elements of the estate existed—marriage, birth of issue, capable of inheriting, seisin in the wife, and death of the wife. There is no language in the deed cutting off the husband's marital rights beyond the death of the wife. Such intention must be clearly expressed. *Carter v. Dale*, 3 Lea (71 Tenn.), 710, 31 Am. Rep., 660; *Frazer v. Hightower*, 12 Heisk. (59 Tenn.), 94; *Bingham v. Weller*, 113 Tenn., 70, 81 S. W., 843, 69 L. R. A., 370, 106 Am. St. Rep., 803.

We are referred to *Monroe v. Van Meter*, 100 Ill., 347, as authority for the proposition that there can be no tenancy by the curtesy when the conveyance is to the *feme* free from the debts and liabilities of the husband. That case does so hold, but its authority is much impaired by the fact that at the time curtesy did not exist in Illinois, as shown in the opinion, it having been abolished by statute, and the evidence failing to show that the issue was born before the passage of the act, it also appearing in that case that the wife left a will by which she disposed of the property, and the two grounds mentioned were held to

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furnish a basis for the decision that there was no curtesy. What was said on the third ground, that there could be no curtesy where the conveyance was to be free of the husband's debts, was merely in passing, and can be of little weight as authority. However, in all three of our own cases cited the conveyance excluded the husband's debts. We quote the language of the last only:

"To Mrs. Caroline Isabella Weller and her bodily heirs, forever, a certain piece or parcel of land on Market street, in Memphis, Tennessee, to be held by her to her own bodily heirs, free from the debts and liabilities of her husband, Jacob Weller." *Bingham v. Weller*, supra.

It was held that the husband had, under this deed, a tenacy by the curtesy; his wife having died after having had issue capable of inheriting.

It is insisted for complainants that the failure to use the word "assigns" in the deed has some bearing on the question. We are unable to see how. The words "heirs and assigns" are customary in deeds, but in this State, under our statute (Shannon's Code, section 3672), wholly unnecessary. However, it has been held that the use of the word "assigns" indicates an intention to give the grantee the power of sale. *Teague v. Sowder*, 121 Tenn., 132, 114 S. W., 484; *Kendall v. Clapp*, 163 Mass., 69, 39 N. E., 773; *Goetz v. Ballou*, 64 Hun, 490, 19 N. Y. Supp., 433; *Johnson v. Morton*, 28 Tex. Civ. App., 296, 67 S. W., 790, 791. It was therefore a very appropriate pre-

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caution to omit that word in a deed restraining alienation.

It is insisted that the expression, to "Laura Hudgins and her heirs free from the debts," etc., imports a purpose to cut off the curtesy. The argument is that the use of the word "heirs" was necessary to carry a fee, under our statute, that every word in a deed must be given some meaning, and that the only meaning that could be imputed would be the cutting off of the curtesy, since the heirs would take no interest under the deed free from the debts of the husband, unless the curtesy should be denied. It is enough to say that in the three cases we have cited (*Carter v. Dale*, *Frazer v. Hightower*, and *Bingham v. Weller*) the same term occurred, and in all of them curtesy was allowed notwithstanding. No importance was attached to the term, as indeed none should have been. Old forms of expression linger in the minds of draftsmen of deeds and other instruments, and importance should not be attached to them, when under the law they do not necessarily show a purpose to qualify estates granted under statutory forms of expression likewise used, where such statutory expressions are themselves sufficient to carry an estate.

Lastly, it is insisted for complainants that, inasmuch as there were four children by the first marriage and only one by the last, the surviving husband, P. T. Sitz, should have a curtesy interest in only an undivided one-fifth of the land. The argument is that, inasmuch as the curtesy was conceded to the

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husband originally because of his duty to support the children of the marriage, the reason fails in the case of stepchildren, and therefore the estate should cease in proportion. Whatever may have been the original reason, it has long since become a rule of property that the estate exists when the four requisites which we have recited exist. So, even if all the children should die in early infancy, leaving the father wholly unburdened with the duty of supporting any child, and he should survive his wife, he would under the law be entitled to curtesy, if the other requisites existed. This was the case of *Templeton v. Twitty*, 88 Tenn., 595, 606, 14 S. W., 435, in which it was held the husband was entitled to curtesy. This assignment must therefore be overruled.

The result is that, for the reasons herein stated, the decree of the court of civil appeals is in all things affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

JACKSON, APRIL TERM, 1916.

**MERCHANTS' COTTON PRESS & STORAGE Co. v. ANDREW
MILLER.***

(Jackson. April Term, 1916.)

**LANDLORD AND TENANT. Premises. Injuries from defects. Em-
ployee of tenant.**

Where the landlord has agreed to keep the premises in repair,
and after notice neglects to do so, he will be liable to an em-
ployee of the tenant who is injured by the defect.

Cases cited and approved: *Thompson v. Clements*, 96 Me., 196;
Davis v. Smith, 26 R. I., 129; *Cavaller v. Pope* (1905), 2 K. B.,
757; *Cameron v. Young*, 12 Ann. Cas., 49; *Brady v. Klien*, 133
Mich., 422; *Dustin v. Curtis*, 74 N. H., 266; *Shute v. Bills*, 191
Mass., 433; *Edwards v. N. Y., etc., R. Co.*, 98 N. Y., 245; *Still-
well v. South Louisville Land Co. (Ky.)*, 58 S. W., 696; *Thomas
v. Vannuel*, 185 Ill. App., 414; *Patten v. Bartlett*, 111 Me., 409;
Flood v. Pabst Brewing Co., 158 Wis., 626; *Stenburg v. Will-
cox*, 96 Tenn., 163; *Miles v. Janvrin*, 196 Mass., 431; *Hutchinson
v. Cummings*, 156 Mass., 329; *Glynn v. Lyceum Theatre Co.*, 87
Conn., 237; *Monahan v. Nat. Realty Co.*, 4 Ga. App., 680; *White
v. Sprague*, 9 N. Y. St. Rep., 220; *Baird v. Shipman*, 33 Ill. App.,
503.

*As to liability of landlord for injury to tenant's guests or
employees for defects in premises see notes on different phases of
the subject in 34 L. R. A., 699, 17 L. R. A. (N. S.), 1161.

Cotton Press & Storage Co. v. Miller.

Cases cited and distinguished: *Ryall v. Kidwell* (1913), 3 K. B., 123; *Campbell v. Portland Sugar Co.*, 62 Me., 552.

FROM SHELBY

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—A. B. PITTMAN, Chancellor.

L. B. PHILLIPS, for plaintiff.

S. P. WALKER, for defendant, Merchants' Cotton Press & Storage Co.

CARUTHERS EWING and EARL KING, for defendant, Memphis Compress Co.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The case is before this court on the grant of a petition for *certiorari* filed by the Merchants' Cotton Press & Storage Company to have reviewed a judgment of the court of civil appeals adverse to it.

The suit was instituted by Miller to recover damages against the Memphis Compress Company (hereinafter called the lessee company) in whose employ Miller was at the time he suffered the personal injury, which is the cause of action. The petitioner company, the owner of the compress plant, was also made a defendant, and for convenience it will be referred to as the lessor company, it having leased the premises to the operating company, the employer of Miller.

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In the declaration it was averred that plaintiff was employed in the compress, and that there had been furnished to him an unsafe place in which to work; that a door of the compress building and its attachments and fastenings were old, worn, defective, and unsafe; that this was true at the time the premises were demised by the lessor company to the lessee company, of which facts the lessor had knowledge, but that it negligently failed to properly repair same, etc.

The trial judge sustained a motion for peremptory instructions interposed by the lessor company, and the court of civil appeals reversed the judgment.

The injury occurred November 12, 1913, to Miller while working as a storage laborer in and about the compress. He had been so employed for only three days when he was injured, and was unacquainted with the confessedly defective condition of the door in question. This door weighed from eight hundred to one thousand pounds, being metal lined for fire protection purposes. It was constructed to be operated by raising after the manner of the ordinary window; weights having been suspended to facilitate its being raised and lowered. The compress building was erected in 1887, and the ropes to which the weights had been attached had worn and broken and the weights had become detached, so that, in order to keep the door up and open, a prop or stick was used as a support. By long use the strips that held either side of the door in place in grooves had worn away and become

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thin. On the day of the accident, at the close of the work hours, in the darkness, Miller and two other laborers went to lower the door. One of these two knocked the prop out before Miller reached a point where he or the third laborer could take hold and ease the door's descent. Its great weight required two or three men to lower it in safety. The door fell suddenly to the floor, and its bound carried it out of the insecure grooves; it fell on Miller, causing painful injuries.

It appeared that the unsafe condition of the door's attachments and fastenings were known to the superintendent of the lessee company in active charge of the plant, and that he had notified its higher officials. Further, as early as September 1-10, 1913, notice thereof had been given to the lessor company with an accompanying request to repair, that company being under contract obligation to the lessee to make repairs. Nothing was done by the lessor company in pursuance of the notice or of the knowledge received by one of its officials about that date while he was at the plant.

There is a sharp and pronounced conflict among the authorities as to the liability of a landlord, who has obligated himself by a contract with his tenant to make repairs, or to keep the premises in repair, to a third person who may be lawfully on the premises and is there injured by reason of the landlord's failure to perform the agreement. Probably the weight of authority is in favor of the rule of nonliability in

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such circumstances, the reasoning in most of the decisions to that effect proceeding on the idea that there is wanting privity of contract between the landlord and the injured person, which privity is deemed to be an essential element of liability.

We say most of the cases, for the reason that some of the decisions of the courts of this country, which reach the result indicated, go further and deny even to the tenant the right to recover for personal injuries that may be consequent on the breach of the landlord's contract to repair the demised premises. Such damages are by them held not to be in the contemplation of the parties, and to be too remote, to be recoverable by the tenant in an action *ex contractu*, and that "to permit of a recovery for such damages based on a contract simply because it is in form an action of tort would be making a distinction that could not be justified by reason or authority." *Thompson v. Clements*, 96 Me., 196, 60 L. R. A., 580; *Davis v. Smith*, 26, R. I., 129, 58 Atl., 630, 66 L. R. A., 478, 106 Am. St. Rep., 691, 3 Ann. Cas., 832, and cases cited in the opinion and the note. More may be said of the logical exactness of this doctrine than of its inherent justice.

The English rule, reannounced by the court of appeals and the House of Lords in *Cavalier v. Pope* (1905) 2 K. B., 757; *Id.* [1907] A. C., 428, 5 Ann. Cas., 713, makes the test of the lessor's liability privity of contract. In that case a tenant was allowed by the court of appeals to recover of his landlord for his own injuries, caused by a defective floor which the

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owner had engaged to repair; but that court and the House of Lords were in accord in holding that the wife of the tenant, who was injured at the same time, was not entitled to a judgment; and this, on the ground that "there was but one contract, and that was made with the husband. The wife cannot sue upon it," and there is no other form in which an action could be maintained. The later case of *Ryall v. Kidwell* (1913), 3 K. B., 123, Ann. Cas., 1915B, 163, follows the above case, in denying a recovery for injuries suffered by a daughter of the tenant and undertakes to refute the contention urged by counsel to the effect that if—

"there might be no remedy on the contract there was a remedy in tort. . . . A person who is not the tenant has no right of action either in contract or in tort"

It is probably true as claimed, that the greater number of the courts of this country that have so far ruled on the point give adherence to the English rule. See cases cited in 24 Cyc., 1119, 1120, and in annotations of *Ryall v. Kidwell*, Ann. Cas., 835, and *Cameron v. Young*, 12 Ann. Cas., 49; also *Brady v. Klien*, 133 Mich., 422, 95 N. W., 557, 62 L. R. A., 909, 103 Am. St. Rep., 455, 2 Ann. Cas., 464, and note; *Dustin v. Curtis*, 74 N. H., 266, 67 Atl., 220, 11 L. R. A. (N. S.), 504, 13 Ann. Cas., 169.

But the fact that several of these courts broadly adhering to the doctrine have created legal fictions, seemingly new to the law, in order to modify the un-

just workings of the rule when projected along logical lines to the ultimate, argues against the soundness of the doctrine itself. Thus, in efforts to escape from manifestly unjust results of such application, it has been held that members of the lessee's family are to be regarded as tenants, and that the landlord owes to them the same duty to keep the premises in a safe condition, in such circumstances, that he owes to the lessee, the only party to the contract, and, it would seem, in privity. *Shute v. Bills*, 191 Mass., 433, 78 N. E., 96, 7 L. R. A. (N. S.), 965, 114 Am. St. Rep., 631, and notes cited above.

Under the broad rule, by which the test of liability is a relation of privity with the lessor, it is not easy to see how there could be any such liability if the agreement to repair is made with a corporate lessee. Such a lessee cannot be injured in person by a failure to keep the promise on the part of the lessor. The rule must exclude liability even to its chief or sole managing officer. Would it operate to deny a recovery to one who held all the capital stock of such a lessee? Would all the members of a copartnership not be protected as being in contractual privity, especially in those jurisdictions where the rule is that a firm is not an entity distinct from its members? What of substantial justice can there be in denying a remedy in the one case supposed, and affording one in the other?

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The cases adhering to the English rule, as seen, recognize the right of the tenant to recover for personal injuries so suffered by him; and, in doing so, it seems to us, they concede the existence of a remedy or measure of relief that cannot be in nature *ex contractu*, in any true sense. The tenant's remedy *ex contractu* would seem to be confined to a recovery of the value of the repairs, on a breach of the agreement by the lessor to make them, as is argued by the Maine court. The notion that a right to sue for personal injuries accrues to the lessee simply because he is a party to the contract is, in essence, but an attempt to graft an action that sounds in tort on a contractual relation. In order to do this, must it not be conceived and conceded that a duty is implied by law to rest upon the lessor, the breach of which is culpable negligence? When this is granted, why deny the implication, and a consequent remedy, in favor of all who fairly may be deemed to be in the contemplation of the contracting parties for protection?

A different theory is enforced by other courts—one that does not need the aid of fictional differentiation in order to the working out of just results. We believe these courts announce the better, and what will develop into the prevailing, doctrine when and as applied to members of the tenant's family or to those in his employ in the use of the premises; in short, to those third persons who form the group of persons who, in the fair contemplation of the contracting par-

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ties, are customarily to make that use of the premises for which they are let.

The action of the injured employee, for example, in such cases is not deemed to be on the contract, for the employee is of course a stranger to the lessor's obligation to repair or keep repaired. The remedy is considered to be one for the wrong committed by the lessor in his negligent failure to perform a duty voluntarily assumed by him which he must be held to know would protect the employee of the tenant, as such user of the demised premises, from injury if his engagement be kept, or expose the servant to injury otherwise. Instead of the duty being law-imposed, it is self-imposed. The fact that the duty is voluntarily taken on should not detract from its scope and effect, or lessen the implication which the law will make. Such a duty on nonobservance may constitute the culpable negligence that is the basis for an action sounding in tort. The implication of legal duty and the *delictum* arise in this way out of the obligation incorporated in the contract, not on the contract. *Edwards v. New York, etc. R. Co.*, 98 N. Y., 245, 50 Am. Rep., 659; *Stillwell v. South Louisville Land Co.* (Ky.), 58 S. W., 696, 52 L. R. A., 325; *Thomas v. Vannuci*, 185 Ill. App., 414; *Patten v. Bartlett*, 111 Me., 409, 89 Atl., 375, 49 L. R. A. (N. S.), 1120; *Flood v. Pabst Brewing Co.*, 158 Wis., 626, 635, 149 N. W., 489. And see *Stenburg v. Wilcox*, 96 Tenn., 163, 33 S. W., 917, 34 L. R. A., 615.

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There is no undue hardship on the lessor in such case. He has seen fit to interpose his own agreement to repair, and thereby tended, at least, to cause the lessee to hold back and wait for its execution on his part. He has elected to retain for his own, as primarily resting on him, the duty of care in the particular regard, and should not complain if the law leaves the burden where he placed it and holds him not exempt.

"To suffer such an exemption . . . we think would be contrary to public policy and substantial justice, for it would not unfrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities, of his proprietorship." *Campbell v. Portland Sugar Co.*, 62 Me., 552, 16 Am. Rep., 503.

In the case at bar the lessor's attention was called to the dangerous state of the doors, one of which caused the injuries of plaintiff, Miller.

This fact has, in several cases, we think justly, been made an essential element of liability on the part of the lessor in such case; that is, that such liability arises only after notice to the lessor, who is not in possession of the premises, of the defect that should be repaired, or the presence of facts from which the law would imply knowledge thereof on his part. *Miles v. Janvrin*, 196 Mass., 431, 438, 82 N. E., 708; *Hutchinson v. Cummings*, 156 Mass., 329, 31 N. E., 127; *Glynn v. Lyceum Theater Co.*, 87 Conn., 237, 87 Atl., 796; *Mona-*

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han v. National Realty Co., 4 Ga. App., 680, 685, 62 S. E., 127.

If the landlord has agreed to keep the premises in repair, and after notice neglects to do so, he will be liable to an employee of the tenant, who is injured by the defect. *White v. Sprague*, 9 N. Y. St. Rep., 220.

It has been held that where an agent of the owner of a building who leases it with a heavy door on it in a dangerous condition at the time, promising to put it in a safe condition, there is liability even to a person who goes there to deliver goods to the tenant, and who is injured by the falling of the door. *Baird v. Shipman*, 33 Ill. App., 503.

The court of civil appeals, so far as the result reached by it is concerned, committed no error. Writ denied.

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ILLINOIS CENT. R. CO. v. CENTERVILLE TELEPHONE CO.
SAME v. SITKA TELEPHONE CO. SAME v. WEST
TELEPHONE CO.*

(*Jackson*. April Term, 1916.)

1. RAILROADS. Right of way. Easement.

Deeds to a railroad right of way construed, and held to convey only an easement, the fee remaining in the grantor. (*Post*, p. p., 199, 200.)

Cases cited and approved: Railroad v. Aslin, 186 S. W., —; Mc-Lemore v. Railroad, 111 Tenn., 639.

2. TELEGRAPHS AND TELEPHONES. Railroad right of way.
Right of telephone lines to cross.

A railroad company, having only an easement in its right of way, does not own to the sky, and cannot enjoin the crossing of overhead telephone wires so long as they do not impair the reasonable and safe use of the easement. (*Post*, pp. 200, 201.)

Cases cited and approved: Flaherty v. Fleming (W. Va.), 3 L. R. A. (N. S.), 461; Bitello v. Lipson (Conn.), 16 L. R. A. (N. S.), 193.

3. COSTS. Change in subject-matter pending suit.

During the pendency of an action to enjoin telephone companies from constructing lines across a railroad right of way, defendants erected new poles and strung wires thereon properly, the previous construction being defective. Held that costs in lower court should be paid by defendants, while costs of appeal should be paid by appellant railroad company. (*Post*, p. 201.)

FROM GIBSON

Appeal from the Chancery Court of Gibson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
COLIN P. MCKINNEY, Chancellor.

*On the right to use railroad right of way for purpose of telephone as against owner of fee, see note in 36 L. R. A. (N. S.), 519.

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J. P. RHODES, C. N. BURCH and H. D. MINOR, for complainant.

J. D. SENTER and ED. SMITH, for defendants.

MR. JUSTICE GREEN delivered the opinion of the Court.

These proceedings were instituted by the Illinois Central Railroad Company to restrain the defendant telephone companies from crossing complainant's right of way with their wires in the manner in which said wires were strung at the time of these suits.

The bills were dismissed by the chancellor, and his decree was affirmed by the court of civil appeals. The railroad company has filed a petition for *certiorari*.

It is insisted upon behalf of the railroad company that it owns the fee in the land covered by the right of way, and that as owner of the fee the railroad company has title to the space above its right of way. We have heretofore had occasion to examine the title of the Illinois Central Railroad Company to its right of way through Gibson county, and we have construed deeds similar to those relied on by the company in these cases. *Railroad v. Aslin*, 186 S. W., —, Jackson, 1914. We concluded that the railroad company took only an easement, and did not take the fee in the land covered by its right of way under said deeds. To this conclusion we adhere. *McLemore v. Railroad*, 111 Tenn., 639, 69 S. W., 338, settles this question. It was

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held in that case that the conveyance of a right of way to the railroad company through the lands of a grantor operated to convey an easement therein only, and the fee remained in the grantor.

Having only an easement, the railroad company is not entitled to have its way kept open to the sky, and the grant to it is not interfered with by constructing overhead telephone wires so long as the reasonable and safe use of the easement is not impaired. 9 R. C. L., p. 799. In notes under *Flaherty v. Fleming* (W. Va.), 3 L. R. A. (N. S.), 461, and *Bitello v. Lipson* (Conn.), 16 L. R. A. (N. S.), 193, numerous cases sustaining the foregoing statement are collected. In these cases it is shown that the owner of the fee may build a bridge for his convenience over the easement or passageway, and the owner of the easement has no ground of complaint, provided the use of his easement is not seriously obstructed.

There is no question of light and air in this case. Neither is it alleged that the wires of defendant telephone companies interfere with telegraph or telephone lines of the railroad company maintained along the right of way. The only interference with the railroad company's use of its easement suggested is the possibility that wires crossing the track may fall and injure a passenger or employee on a train beneath.

Under the proof in this case such a possibility is remote. After this suit was instituted the defendant telephone companies erected new poles of suitable character, and they strung their wires from pole to

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pole across the track in an approved manner. The construction adopted by the telephone companies was such as the witnesses for the railroad company said was a safe method of construction. It is also shown that the telephone companies employ watchmen to look after their lines constantly. We are of opinion, therefore, that the apprehension of danger from these wires by the railroad company is fanciful under the facts of this case, considering the manner in which the wires of defendant telephone companies are strung and maintained. The possibility of the railroad company suffering any injury from these wires is too slight to justify the court in ordering a removal thereof.

It is probably true that when these bills were filed these wires were not strung in a proper manner. The new poles were erected and the wires securely attached to these poles after the suits below were filed. Prior to these suits the wires were rather insecurely attached to limbs of trees on either side of the track, and there was a reasonable ground of apprehension on the part of the railroad company.

Such being the facts, we think that the defendant telephone companies should be taxed with the costs below. The costs incident to appeal, however, and the costs of this court will be paid by the railroad company.

The writ of *certiorari* is accordingly granted, but the decree of the court of civil appeals is affirmed, with the modification as to costs indicated.

Mengel Box Co. v. Fowlkes.

MENDEL BOX COMPANY v. W. A. FOWLKES *et al.*

(Jackson. April Term, 1916.)

1. STATUTES. Construction. Title of act.

Priv. Acts 1915, chapter 186, entitled "An act to establish a levee and drainage district . . . and for the purpose of draining and the reclamation of the wet and swamp lands, . . . and prescribe the method of doing so, and providing for the assessment and collection of the cost and expense of such improvement, and the manner of obtaining the means and funds therefor," is violative of Constitution article 2, section 17, providing that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title, in that section 4 of the act provides that a court composed of the chairman or judges of the county courts of the counties within the district shall sit once each month for the purpose of hearing and determining such questions as may be necessary to be passed upon under the act; it creating a new and independent court. (*Post*, pp. 203-206.)

Acts cited and construed: Acts 1915, ch. 186.

Constitution cited and construed: Art. 2, sec. 17.

2. COURTS. Definition.

A court is an instrumentality of sovereignty, the repository of its judicial power, with authority to adjudge as to the rights of person or property between adversaries; the presence of judges being necessary as an essential element. (*Post*, pp. 206, 207.)

Case cited and distinguished: Railroad v. Crider, 91 Tenn., 489.

FROM DYER

Appeal from the Chancery Court of Dyer County.—
COLIN P. MCKINNEY, Chancellor.

Mengel Box Co. v. Fowlkes.

S. G. LATTA, for appellants.

RANDOLPH & RANDOLPH and ASHLEY & CAMPBELL, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed by the Mengel Box Company to enjoin action under what is claimed to be a void act of the legislature (Private Acts 1915, chapter 186), which action, it is alleged, will be detrimental to its interests as a large landowner.

The legislature at its last session passed a bill creating the Dyer levee and drainage district for the purpose of authorizing the building of a levee and the draining, on the assessment plan, of a territory of about 200,000 acres lying along the Mississippi river, and extending from a point near Reelfoot Lake down to the mouth of Obion river.

The act names three directors to proceed to establish the district and bring about an execution of the design. They began to do so, giving notice to the landowners in the district as the act provides; whereupon the bill of complaint was filed. A demurer to it was overruled by the chancellor, who permitted an appeal to be prosecuted.

The principal attack made on the constitutionality of the act is based on those sections which make provision for a court adjudication of property rights, assessments, etc. It is urged by complainant com-

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pany that there was not adopted by the legislature any existing court or judicial machinery for this purpose, but that an effort was made to create a new and special tribunal for the trial of all matters concerning the district and involved in dispute, and that the legislative bill therefore embraced more than one subject, that the creation of such a new tribunal was not set out in caption, and that the bill was not constitutionally passed because of a violation of article 2, section 17, of the Constitution.

Counsel of the defendants concede, as he must, that if a new court is so provided for, the act must fall for the reason just stated.

The caption of the bill is in the following language:

“An act to establish a levee and drainage district to be known as the Dyer levee and drainage district, within the following boundaries, to wit: (Here reciting them)—for the purpose of erecting a levee from the high ground south of Tiptonville, Tennessee, to the mouth of the Obion river, and for the purpose of draining and the reclamation of the wet and swamp lands within such boundaries, and prescribe the method of doing so, and providing for the assessment and collection of the cost and expense of such improvement, and the manner of obtaining the means and funds therefor.”

Section 4 of the act is in the following language:

“That at the time and place fixed by the said board of directors in the said publication, a court composed of the chairman or judges of the county courts of the

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counties of Dyer, Lake and Obion shall sit for the purpose of hearing the objections of any person or persons who may file the same. The said court so composed of said chairman or judges of the said counties or any two of them shall sit on the second Tuesday of each month in the courthouse at Dyersburg, Tennessee, for the purpose of hearing and determining such questions as may be necessary to be passed upon under this act, and their findings and decrees shall be entered on the minute books of the county court of Dyer county, and certified copies thereof, if ordered by the said court, shall be entered on the minute books of the county courts of Lake and Obion counties. And the court costs, not otherwise provided, and expenses of the said judges shall be paid out of the fund of the said levee and drainage district. The proceedings hereunder shall be known and styled as the 'Dyer levee and drainage district' case, and referred to hereafter as the original case. The concurrence of opinion of any two of said judges shall be the finding of said court."

In subsequent sections provisions are made for the filing of objections on the part of property holders with the court, which shall determine the issues; in short, the power conferred is that of adjudicating all questions of law and fact presented. The right of appeal from the judgment of the court to the supreme court is given.

We are of opinion that the court thus provided for was a new tribunal.

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A court is an instrumentality of sovereignty, the repository of its judicial power, with authority to adjudge as to the rights of person or property between adversaries. The presence of a judge or judges is necessary as an essential element of a court. A "court" was defined by Bacon to be "an incorporeal being, which requires for its existence the presence of the judges or a competent number of them."

The term as defined by Mr. Bouvier in his Law Dictionary (quoted by this court in *Railroad v. Crider*, 91 Tenn., 489, 505, 19 S. W., 618, 622), is this:

"The presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place, at an appointed time, engaged in the full and regular performance of its duties."

The act in question fixes a place and the times for the sessions of the court. It is provided to be composed of three judges. Its jurisdiction, attributes, and functions are those of a court.

It is claimed by the defendants that no new tribunal is established, and that the act should be deemed merely to provide an enlargement of the jurisdiction of the regular county court of Dyer county then in existence. If this had been the purpose, it could have been easily expressed.

On the contrary, no mention is made of an existing court. It is stipulated that any two of the individuals (chairman and judges of county courts) named to act

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as judges may hold the court and pass decrees in the absence of the third. This absent one may be the county judge of Dyer county. May it be said in truth that in such case the court, so conceived of as being held, is the regular county court of Dyer county?

The court is a new tribunal, vested, it is true, with a limited jurisdiction, and has its genesis, if at all, in the act under review. Instead of utilizing an existing judicatory, the legislature purposed to create an independent one and to cause it to be presided over by judges drawn from the three counties in which was located the improvement district. The fact that its minutes are provided to be spread on the minute book of the Dyer county court is an incidental detail, not affecting, in substance, the nature of the court itself.

Manifestly the design of the legislature was to establish an inferior court, under the power given it to that end by the Constitution. We could not hold otherwise, in furtherance of a praiseworthy enterprise, without doing violence to the language employed by the legislature.

The result is therefore that the chancellor did not err in holding the act to be unconstitutional. Affirmed.

SWIGGERT, Special Justice, took no part in the consideration and decision of this case.

Farabee-Treadwell Co. v. Bank & Trust Co.

**FARABEE-TREADWELL CO. v. UNION & PLANTERS' BANK &
TRUST CO.**

(*Jackson*. April Term, 1916.)

1. ACTION. Contract or tort. Action on contract.

An action against the bank for damages resulting from breach of a contract to loan money is an action sounding in contract, and not in tort. (*Post*, pp. 212, 213.)

Case cited and approved: *James v. Bank*, 105 Tenn., 1.

Code cited and construed: Sec. 4468 (S.)

2. CONTRACTS. Mutuality. Contract to loan money.

A bank is liable for breach of a contract to loan money in consideration of the transfer of a deposit, such a contract not being unilateral, the consideration being the agreed transfer of deposit. (*Post*, pp. 214-216.)

Cases cited and approved: *Lowe v. Turple*, 147 Ind., 652; *Anderson v. Hilton & D. Lbr. Co.*, 121-Ga., 688; *Hedden v. Schneblin*, 126 Mo. App., 478; *Holt v. United Security L. Ins. & T. Co.*, 76 N. J. Law. 585; *Bixby-Theirson Lbr. Co. v. Evans*, 167 Ala., 431;

Case cited and distinguished: *Manchester & O. Bank v. Cook*, 49 L. T. N. S., 694.

3. DAMAGES. Contracts to loan money. Damages for breach. Loss of profits.

Where a bank breached a contract to loan a grain dealer money with which to pay for corn purchased, and the grain dealer was thereby compelled to make a forced sale of the grain, he was entitled to recover the loss actually suffered by reason of the forced sale, but he was not entitled to recover a profit which he might have made by reason of an advance in the market; such profit being purely speculative. (*Post*, pp. 216, 217.)

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FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
BEN L. CAPELL, Judge.

F. M. GILLILAND and J. H. MALONE, for plaintiff.

JACKSON & McREE, for defendants.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought to recover damages from defendant bank for its refusal to make a loan of money to the complainant in violation of a previous contract entered into between the parties. Demurrers were interposed which were sustained by the trial court, and the suit dismissed. The court of civil appeals reversed the action below, held that the declaration presented a good cause of action, and remanded the case for trial. The bank has filed a petition for *certiorari*.

The declaration avers that the plaintiff was a mercantile corporation at Memphis dealing in grain and hay; that about December 11, 1912, defendant bank solicited plaintiff to change its bank account and become a depositor with defendant; that plaintiff then

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advised defendant that considerable money was required in the business of the former, that it had purchased 20,000 bushels of corn for future delivery, and that it would need \$10,000 to pay for the same prior to January 1st following. It is alleged that plaintiff and the bank then entered into an agreement whereby, in consideration of the removal of plaintiff's account to defendant bank, the latter undertook to loan to the plaintiff as much as \$10,000 to pay for the said purchase of corn upon delivery to defendant of plaintiff's note secured by collaterals, such as bills of lading or warehouse receipts covering the purchase of corn. According to the declaration, plaintiff explained that it was a member of the Merchants' Exchange of Memphis, and under the rules of the exchange was required to pay for any commodity purchased on the day delivery was tendered, and that if such payment was not made plaintiff would be suspended from the Exchange and its credit destroyed. It is charged that defendant bank informed plaintiff that the bank itself belonged to the Exchange and was familiar with its rules. It is then averred that in pursuance of this agreement plaintiff removed its account from another bank and deposited \$3,859.88 with defendant, and thereafter, on December 20th, plaintiff notified defendant that the corn referred to would be delivered within a few days, and it would need the \$10,000. It is alleged that defendant then and there promised to make this loan to plaintiff on the terms aforesaid. The declaration then charges that on December 26, 1912, one-half of

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the corn was tendered to plaintiff, and plaintiff applied to defendant for part of the loan agreed upon, to wit, \$5,000, but that defendant willfully and wantonly breached its contract, "and its president, in a loud, insulting tone, and in the presence of divers citizens, without any excuse, wantonly and willfully, and with a reckless disregard of the rights of the plaintiff, refused to loan plaintiff said sum and carry out the contract of the defendant, whereby and by reason whereof plaintiff was compelled to resell said corn and other commodities owned by it upon the open market at a great loss to it," etc. It is said that when the bank thus breached its contract it was too late for the plaintiff to procure a loan elsewhere to pay for the corn purchased, for which, under the rules of the Exchange, settlement had to be made on the day upon which delivery was tendered.

The foregoing facts are stated in four counts of the declaration, and the plaintiff sues in one count for \$1,000 damages which it lost by reason of the necessity of making a forced sale of the grain to meet its obligation therefor. In another count of the declaration plaintiff sues for \$1,500 damages which it claims to have sustained by reason of a loss of profit on the transaction; it being set out that the price of corn immediately advanced and plaintiff was deprived of its expected profit. Another count of the declaration seeks damages for the injury to the credit and financial standing of plaintiff said to have resulted from the action of the bank in the premises which it is charged

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became noised about. The fourth count of the declaration sets out the facts and groups the claims for damages separately set up in the three previous counts.

The declaration also alleges that, when this loan was refused by the president of the bank, the said bank official in a violent and insulting manner directed the plaintiff to remove its account from defendant bank, and that this statement was made in the presence of divers good citizens near by.

There has been much discussion in the case as to whether this was an action upon the contract or in tort. The court of civil appeals took the view that it was a suit in tort, and that plaintiff was accordingly entitled to recover all damages it sustained growing out of the tort, which that court thought included every item of damage set out in the declaration aforesaid.

We are unable to agree with the conclusion of the court of civil appeals that this can be treated as a case in tort. It cannot be likened to the case of *James v. Bank*, 105 Tenn., 1, 58 S. W., 261, 51 L. R. A. (N. S.), 255, 80 Am. St. Rep., 857, in which the bank refused payment of the checks of a customer who had an adequate balance. It was held in that case that the law imposed upon the bank the duty of paying its depositor's checks as long as there was a sufficient balance to the depositor's credit. So the bank violated an obligation imposed by law as well as by contract.

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In the case before us it is charged that the bank refused to make the loan as it had agreed, and ordered the depositor to remove its account. In neither respect did the bank violate any duty imposed by law. The law did not require the bank to make the loan, nor did it require the bank to keep plaintiff's account any longer than it desired. No question of tort arises so far.

If the president of the bank committed a legal wrong by the violent way in which it is said he refused this loan and ordered plaintiff to remove its account, in the presence of others, the wrong consisted in speaking such words in such a manner in the presence of others, not in the act of refusing the loan and closing the account. Granting that such treatment injured the credit of the plaintiff, nevertheless the injury was caused by the words of the bank president spoken in the presence of others and communicated to others. Such, at least, was the only semblance of violation of legal duty on the part of the bank official, and the only thing upon which an action in tort could be predicated. Such conduct, if actionable, is so because the words spoken were slanderous. One ground of demurer is that more than six months elapsed after the incident at the bank and the bringing of this suit. In so far as the action could be suspected as one resting upon tort, this demurer would defeat it. Shannon's Code, section 4468.

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Treating the suit as one upon contract, the bank demurs on the theory that no damages can be recovered for the breach of the contract to lend money except nominal damages, or the difference between the contract rate of interest and the prevailing rate at which money might be elsewhere obtained. Such is the general rule with respect to the breach of contracts of this nature. *Lowe v. Turpie*, 147 Ind., 652, 44 N. E., 25, 47 N. E., 150, 37 L. R. A., 233; *Anderson v. Hilton & D. Lbr. Co.*, 121 Ga., 688, 49 S. E., 725; *Hedden v. Schneblin*, 126 Mo. App., 478, 104 S. W., 887.

Other cases, however, hold that under special circumstances there may be a recovery of substantial damages proximately resulting from a breach of contract to lend money—losses directly incurred by the injured party. *Holt v. United Security L. Ins. & T. Co.*, 76 N. J. Law, 585, 72 Atl., 301, 21 L. R. A. (N. S.), 691, and *Bixby-Theirson Lbr. Co. v. Evans*, 167 Ala., 431, 52 South., 843, 29 L. R. A. (N. S.), 194, 140 Am. St. Rep., 47.

A number of cases on the subject are collected in notes in 37 L. R. A., 233, and 29 L. R. A. (N. S.), 194.

In *Manchester & O. Bank v. Cook*, 49 L. T. N. S., 694:

“One of the judges said where special damage is the result of a breach of contract to lend money, and a person is deprived of the opportunity of getting money elsewhere, the ordinary rule of damage applies.” Ed. note, 37 L. R. A., 233.

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The declaration in this case avers that under the rules of the Merchants' Exchange, to which plaintiff belonged, payment for commodities purchased had to be made upon the date delivery was tendered. It seems from the declaration that the bank was advised of this rule, being itself a member of the Exchange, and the agreement for this loan was made with this rule of the Exchange in contemplation of both parties to this contract. The declaration sets out that, when the bank breached its contract to make the loan to plaintiff, it was then too late for plaintiff to procure funds elsewhere to pay for the corn purchased within the time payment was required under the rules of the Exchange, and plaintiff was accordingly under the necessity of making a forced sale of the grain.

If the plaintiff is able to establish upon a trial of the case that it did have such contract as charged, and that the bank breached it under the circumstances detailed in the declaration, and that plaintiff did not have time after the loan was refused to procure funds elsewhere in order to meet its obligation, then under such circumstances we think the bank is liable to the plaintiff for the special damage claimed. That is to say, the bank is liable for the loss plaintiff suffered by reason of the necessity of making a forced sale of this corn. Such loss naturally and proximately followed the bank's breach of contract under the circumstances alleged, and was a loss necessarily within the

contemplation of the parties under the peculiar contract averred.

The conduct of the bank imputed to it by the declaration deprived the plaintiff of an opportunity to get money elsewhere, and the case falls directly within the rule announced in the expression of the judge in *Manchester & O. Bank v. Cook*, supra.

Another ground of demurrer is that the alleged contract is unilateral. We think the court of civil appeals properly overruled this demurrer. The fact that plaintiff was not required to borrow the money did not relieve the bank of its obligation to make the loan as it had contracted to do. The bank received a substantial deposit as a consideration for its agreement to extend this credit when called upon.

Another ground of demurrer challenges the right of plaintiff to recover the \$1,500 claimed as the difference between the price at which it purchased the corn and the price at which corn thereafter sold on the market. It is insisted that such damage was not within the contemplation of the parties at the time of the contract.

Whether such an item might be said to have been within the contemplation of the parties need not be determined. We think recovery must be denied to the plaintiff for two reasons.

In the first place, such a claim of damage is purely speculative. The grain market fluctuates, and no one can possibly say at this time when the plaintiff would have sold the corn purchased. There might have

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been a loss on the transaction. At any rate, the amount of the lost profit cannot be determined because it cannot be concluded with any certainty at what stage of the market plaintiff would have sold the grain.

Moreover, it was the duty of the plaintiff to have done everything possible to mitigate its damage. If it had enjoyed the credit and standing averred in the declaration, it might, after the bank had refused the loan, have procured funds elsewhere and bought other grain and obtained the benefit of the rise in the market. The bank should not be held responsible for the inaction of the plaintiff, a trader and grain dealer, at this time.

The conclusion that the action is not one in tort, or is barred in so far as a tort is averred, denies recovery for the alleged injury to plaintiff's credit. If plaintiff proves the case stated in the declaration, there may be a recovery for the loss by reason of the forced sale of the grain. In the opinion of the court, the loss of profits is speculative.

Other grounds of demurrer are overruled.

The judgment of the court of civil appeals, modified as herein indicated, is affirmed, and the case remanded for further proceedings.

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RAYMOND McCORMICK v. STATE.*

(Jackson. April Term, 1916.)

1. WITNESSES. Competency. Husband and wife. Objections. Time.

The defendant in a criminal case should object to the offer of his wife as a witness against him when she is first offered. (*Post*, pp. 221, 222.)

Code cited and construed: Sec. 7199 (S.).

2. STATUTES. Validity. Subjects and titles of acts.

Acts 1915, chapter 161, entitled "An act to permit the husband or wife to testify," and providing that they shall be competent to testify for or against each other in criminal cases, is not invalid, under Constitution article 2, section 17, providing that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title; the means employed in the act being the only way of accomplishing the object stated in the title, regardless of whether the words may compel the spouse to testify, that being an incidental result. (*Post*, pp. 222-224.)

Acts cited and construed: Acts 1915, ch. 161.

Case cited and approved: Cannon v. Mathes, 55 Tenn., 521.

Constitution cited and construed: Art. 2, sec. 17.

3. WITNESSES. Privilege. Husband and wife.

Acts 1915, chapter 161, making the husband and wife competent witnesses for or against each other in criminal cases, does not destroy the rule that communication between them by virtue or in consequence of the marital relation, or any confidential communications between them, are inadmissible. (*Post*, pp. 224-228.)

Acts cited and construed: Acts 1915, ch. 161; Acts 1879, ch. 200.

*As to effect of Statute making husband and wife competent witnesses for or against each other upon the privilege as to confidential communications between them, see note in 27 L. R. A. (N. S.), 273.

Upon the question of waiver of privilege as to communication between husband and wife by calling one spouse as witness for the other, see note in 40 L. R. A. (N. S.), 43.

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Cases cited and approved: Patton v. Wilson, 70 Tenn., 101; Orr v. Cox, 71 Tenn., 621; Hyden v. Hyden, 65 Tenn., 408; Brewer v. Ferguson, 30 Tenn., 565; Kimbrough v. Mitchell, 38 Tenn., 540; Barker v. McAuley, 51 Tenn., 424; Mercer v. State, 40 Fla., 216; Ex parte Beville, 58 Fla., 170.

Cases cited and distinguished: Ins. Co. v. Shoemaker, 95 Tenn., 82; Norman v. State, 127 Tenn., 355.

Code cited and construed: Secs. 5596, 5597 (S.).

4. WITNESSES. Confidential relations. Husband and wife.
Time for objections.

An objection by one accused of crime to a question asked his wife as witness, before the answer, because calling for confidential matter arising out of the marital relation, was properly and seasonably made. (*Post*, pp. 228-230.)

Case cited and approved: Kimbrough v. Mitchell, 38 Tenn., 540.

5. CRIMINAL LAW. Trial. Objections. Repetition.

It is not necessary to repeat an objection to a question put to a witness, one ruling on one question being enough, nor is repetition of similar exceptions required. (*Post*, pp. 230, 231.)

Case cited and approved: L. & N. R. R. Co. v. Gower, 85 Tenn., 471.

6. WITNESSES. Privilege. Waiver.

Where the objectionable portions of testimony of defendant's wife were not brought out on cross-examination, he did not by the cross-examination waive his right to object and except to such testimony, especially where he moved to strike all her testimony. (*Post*, pp. 231-233.)

Cases cited and approved: Baxter v. State, 83 Tenn., 664; White v. Suttle, 31 Tenn., 174; Tobin v. Railroad (Mo. 1891), 18 S. W., 996; Martin v. Railroad (1886), 103 N. Y., 626; Thomas v. State, 121 Tenn., 83; Scott v. Bank, 123 Tenn., 287.

Cases cited and distinguished: Horres v. Berkeley Chemical Co., 57 S. C., 189; Cathey v. Railroad, 104 Tex., 39; Barker v. Railroad, 126 Mo., 143.

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7. WITNESSES. Privileged writings.

The general rule is that letters between spouses are privileged, falling within the privilege for confidential communications which prevails between husband and wife. (*Post*, pp. 233-237.)

Cases cited and approved: *State v. Wallace*, 162 N. C., 622; *Gross v. State*, 61 Tex. Cr. R., 176.

8. CRIMINAL LAW. Trial. Conduct of counsel.

Counsel should not argue from evidence excluded by the court, or upon other cases, where there is nothing in the record to sustain the reference. (*Post*, pp. 257, 238.)

FROM HENRY

Error to the Circuit Court of Henry County.—
THOS. E. HARWOOD, Judge.

FITZHUGH & MORTON, for plaintiff in error.

W. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. A. R. GHOLSON, Special Judge, delivered the
opinion of the Court.

The plaintiff in error, who will hereinafter be called the defendant, was indicted at the November term, 1914, of the circuit court of Henry county, for begetting an illegitimate child upon his wife's sister. He was tried and found guilty by a jury at the July term, 1915. Motions for a new trial and in arrest of judgment were made and overruled, and judgment was rendered that he be confined in the penitentiary

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of the State for an indeterminate period of not less than two years, nor more than ten years, and that he be rendered infamous, etc. From this judgment defendant has appealed to this court, and has assigned errors.

It is conceded by the learned assistant attorney-general that the judgment of infamy rendered by the lower court should be modified, so as to disqualify the defendant from holding office, but that no further disqualification should be adjudged; the offense described in the indictment not being an infamous crime. Shannon's Code, section 7199.

The case has been ably argued in this court, and most excellent and helpful briefs have been filed by both sides.

We do not deem it necessary, in the view which we take of the case, to discuss the evidence any further than it may be needed to consider those assignments of error which we will specifically consider.

The fifth assignment of error is as follows:

"The court erred in declining to set aside the verdict and grant the defendant a new trial, because, over the defendant's objection, the court permitted the wife of defendant to testify against him, contrary to the rules of law and evidence."

It is insisted for the state that the defendant, not having objected to his wife when offered as a witness, an objection being later offered to only certain parts of her testimony, cannot now be heard to question her competency as a witness.

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The constitutionality of chapter 161, Acts of 1915, is attacked; said act being in words and figures as follows:

“An act to permit the husband or wife to testify for or against each other in all criminal cases in Tennessee.

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that hereafter in all criminal cases in the State the husband or wife shall be a competent witness to testify for or against each other. ”

The State insists that, even without the above act, the wife would have been allowed to testify, if no objection was offered to her competency as a witness, and that, as the defendant did not seasonably offer such objection, he cannot question the validity of said act.

We think that this point is well taken, and that the objection should have been made by the defendant when she was first offered as a witness against him. But inasmuch as the court was subsequently asked to exclude all of her evidence, and as the question is one of importance, we deem it proper to consider the constitutionality of the above act.

It is contended by counsel for the defendant that the title of said act is restrictive, and that the body is general; that the express intent is “to *permit* the husband or wife to testify for or against each other in all criminal cases in Tennessee;” and the body of the act says, “The husband or wife *shall* be a com-

petent witness," etc.; that the legislative intention as expressed in the caption was permissive—that is, either the husband or wife would be permitted to testify when either voluntarily offered as a witness, but not that either would be a compellable witness; that the body of the act meant that all the power of the law might be brought to bear to force one spouse to testify against the other.

The constitutional provision invoked is section 17 of article 2, as follows:

"No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The provision of our Constitution just quoted was adopted to prevent surprise upon the legislature, by means of provisions in bills of which the titles gave no intimation, and they might therefore be overlooked and carelessly and unintentionally adopted. *Cooley*, Const. Lim. 145; *Cannon v. Mathes*, 8 Heisk., 521.

The method adopted in the body of the act for accomplishing the purpose expressed in the caption was to make the husband and wife competent witnesses, and thus to authorize or permit each to testify for or against the other. If it should result, from the making of the husband and wife competent witnesses, that each may be compelled to testify against the other, that is a mere incidental result of the provisions of the act which would be necessary to accomplish the purpose described in the caption of the act. It cannot be held invalid because of such result. This

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provision of the body of the act is not only germane to the subject expressed in the title, but is a direct means, and probably the only direct means, available for accomplishing the purpose expressed in the caption. We are therefore of the opinion that the attack on the constitutionality of said act is without merit.

The sixth and seventh assignments of error are that the trial judge erred in permitting defendant's wife to testify to statements made by defendant to her in private, and in confidence, on the ground that such statements were privileged communications, and therefore incompetent as evidence against him.

It was contended in support of these assignments of error that the act above quoted, making the husband or wife a competent witness, does not affect the rules of law relating to privileged testimony, and that although made a competent witness, by removal of the disability of coverture, one spouse cannot divulge the confidential communications of the other, and may not testify against the other to facts which may have come to his or her knowledge solely by virtue of the marital relation.

In the case of *Insurance Co. v. Shoemaker*, 95 Tenn., 82, 31 S. W., 270, Mr. Justice Wilkes concisely stated the rule in this State, in civil cases, as follows:

"We are of opinion that *all* transactions and conversations had between the husband and wife in relation to their own affairs, not in the presence of some third person . . . must be excluded. . . . This, we think, is in accord with the former holdings

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of this court"—citing *Patton v. Wilson*, 2 Lea, 101, 113; *Orr v. Cox*, 3 Lea, 621; *Hyden v. Hyden*, 6 Baxt., 408; *Brewer v. Ferguson*, 11 Humph., 565; *Kimbrough v. Mitchell*, 1 Head, 540; and *Barker v. McAuley*, 4 Heisk., 424.

The case of *Norman v. State*, 127 Tenn., 355, 155 S. W., 135, 45 L. R. A. (N. S.), 399, is one in which a very able opinion was delivered by Mr. Justice Buchanan, wherein he said:

"No public policy is sound which, in the name of public justice, invades the home and takes therefrom the wife as a witness against the husband, or the husband against the wife, and by means of the evidence of one consigns the other to the gallows, the penitentiary, or the jail. An increased number of convictions might result from such a policy, but at a cost which the public could ill afford. The home is the sanctuary of our civilization, and the increased number of convictions would not compensate for the homes destroyed."

The foregoing decisions were rendered before the passage of Acts 1915, chapter 161. This act does not have the provision of chapter 200 of the Acts of 1879 (Shannon's Code, sections 5596 and 5597), that neither of them "shall testify as to any matter that occurred between them by virtue or in consequence of the marital relation."

So we must decide whether or not, since the passage of said act of 1915, a husband or wife will be permit-

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ted, over objection, to testify in criminal cases in this State, as to any matter that occurred between them by virtue or in consequence of the marital relation, or as to any confidential communications between them.

"All communications between husband and wife are presumed confidential and privileged until the contrary appears." Wigmore, Ev., section 2336, pp. 3260, 3264.

The supreme court of Florida, in passing upon the statutes of that State removing the incompetency as witnesses of husband and wife, because of the interest of either, in both civil and criminal cases, among other things said:

"Society has a deeply rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage, and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital *status*. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses. . . . But the reason of the rule for excluding the confidences between husband and wife as incompetent matter to be deposed by either of them, though they may be competent witnesses to testify to other facts, is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the

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heads of the family circle so necessary to every well-ordered civilized society. The matter that the law prohibits either the husband or wife from testifying to as witnesses includes any information obtained by either during the marriage and by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. And the same rule prevails in full force, even after the marital relation has been dissolved by death or divorce. Where the incompetency as witnesses of husband and wife on the ground of interest has been removed by statute, as is the case here, either of them may testify, for or against the other, to any fact the knowledge of which was acquired by them independently of their marriage relation, in any manner not involving the confidence growing out of the marriage relation. As Mr. Greenleaf puts it: 'The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards divulged in testimony, even though the other party be no longer living.' 1 Greenl. Ev. (15th Ed.), pp. 254, 334, 337." *Mercer v. State*, 40 Fla., 216, 24 South., 154, 74 Am. St. Rep., 135 and authorities cited.

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The same court in the case of *Ex parte Beville*, 58 Fla., 170, 50 South., 685, 27 L. R. A. (N. S.), 273, 19 Ann. Cas., 48, cited with approval the case of *Mercer v. State* supra, and again held that the change of the common-law rule, by making one spouse a compellable and competent witness against the other, does not affect the rule against disclosure of marital communications.

The *Beville Case* is reported and fully annotated in 19 Am. & Eng. Cas., 48.

See, also, Underhill, Crim. Ev., 2245, and Elliott on Ev., vol. 1, section 628.

It was conceded by the learned assistant attorney-general that the authorities appear to sustain the contention of learned counsel for the defendant upon this proposition and we think that he was eminently correct. We are therefore of the opinion that, while chapter 161 of the Acts of 1915 made a husband or wife a competent witness to testify for or against each other in all criminal cases, it did not abrogate the rule as to privileged or confidential communications. Sound public policy requires that neither the husband nor the wife shall be permitted to testify, in criminal cases, as to any matter coming to his or her knowledge by reason of the marital relation. The sacredness of the home and the peace of families can only be preserved and protected by enforcing this long-established rule of the common law.

It is earnestly insisted for the State, however, that the defendant cannot take any advantage of any

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error in the ruling of the learned trial judge in admitting the testimony of the wife of the defendant, both because of defendant's failure to make proper objections thereto in the court below, and because by the cross-examination of the wife the defendant himself brought out all the privileged evidence testified to by her in chief, and more, and by causing her to embody all the objectionable testimony in her cross-examination defendant waived his original objection, and cannot, therefore, now attack the ruling of the trial judge thereon.

The wife, Mrs. Edith McCormick, was asked, on original examination, what her husband, the defendant, had said to her about his association with her sister Edna, upon whom it was charged in the indictment that the child was begotten. This question was objected to by defendant, because calling for confidential matter arising from the marital relation. The objection was overruled by the court, and defendant reserved an exception. The witness was then permitted to answer the question, saying that her husband told her that he was in trouble about Edna, and would have to leave or be killed; that he was guilty; that he had been too intimate with her only once, about January 1st.

On Cross-examination by defendant, the wife testified that he confessed his guilt to her before he went to Missouri; that Edna had asked him to help her get rid of the child, which he declined to do; and

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that her husband had told her these things privately, confidentially, and when they were alone.

Defendant then offered this objection, which was overruled:

"Counsel for defendant here objected to the entire testimony of this witness, Mrs. Edith McCormick, on the ground that her entire testimony was in regard to matters arising out of the relation of husband and wife, which are privileged and confidential."

We are of opinion that the objection of defendant to the admission of this testimony was properly and seasonably made. When the question was asked her to tell what her husband had told her about his association with her sister, it was objected to, and the reason of the objection stated. This objection was overruled, and exception was taken. The question clearly called for an answer that was incompetent, as privileged, under the rule hereinbefore stated. It was presumed to have been privileged. *Wigmore, Ev.*, section 2336, page 3260, and cases cited; *Kimbrough v. Mitchell*, 1 Head, 540.

It was not necessary to repeat the exception, as one ruling on one question is enough, and a repetition of similar exceptions is not required. *L. & N. R. R. Co. v. Gower*, 85 Tenn., 471, 3 S. W., 824. The request that all the testimony of the wife be excluded, after she was re-examined was unnecessary, and at most was but a reaffirmation of the objection already made and overruled, to which exception had already been

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taken. It simply showed that the defendant did not acquiesce in the ruling of the court.

The objectionable portions of the wife's evidence were not elicited by the cross-examination of the defendant. They had already been brought out by the State over the objection of the defendant. Therefore this question does not come within the rule of *Baxter v. State*, 83 Tenn. (15 Lea), 664, 665. Exception was duly and specifically taken in the trial court; hence the further rule in *Baxter v. State*, supra, of 8 Ency. Pl. & Pr., pp. 217, 218, and of *White v. Suttle*, 1 Swan, 174, does not apply.

As to the contention of the State that the cross-examination by defendant of the wife as to confidential matters brought out on direct examination was a waiver of the original objection. In the case of *Horres v. Berkeley Chemical Co.*, 57 S. C., 189, 35 S. E., 500, 52 L. R. A., 43, it was said:

"It cannot be good law that, after a party has excepted to the ruling of the presiding judge admitting incompetent testimony (which ruling is the law of the case on that trial in the circuit court), the exceptor is prevented from cross-examinaing plaintiff's witness on the matter excepted to, or offering testimony . . . on the same line."

And from the case of *Cathey v. M., K. & T. R. R. Co.* (Supreme Court of Texas), 104 Tex., 39, 133 S. W., 419, 33 L. R. A. (N. S.), 103, we quote:

"It would indeed be a strange doctrine, and a rule utterly destructive of the right, and all the benefits

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of cross-examination, to hold a litigant to have waived his objection to improper testimony because by further inquiry he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on cross-examination repeat or restate some or all of his evidence given on his direct examination."

In the case of *Barker v. St. Louis, I. M. & S. R. Co.* (Supreme Court of Missouri), 126 Mo., 143, 28 S. W., 866, 26 L. R. A., 845, 47 Am. St. Rep., 646, it was said:

"Nor can it matter, in the result, that the defendant's counsel, on cross-examination asked the witness to repeat his account of the interview with the conductor. That course did not amount to a waiver of the right to urge the exception already saved to the ruling of the court in admitting that interview. Counsel might properly conform to that ruling for the purposes of the trial without thereby waiving the right to review the admission of incompetent evidence that had come in over his objection. After that evidence was before the jury, he might then combat it or meet it, as best he might, without waiving the exception already taken. *Tobin v. Missouri Pac. R. Co.* (Mo. 1891), 18 S. W., 996; *Martin v. N. Y., N. H. & H. R. Co.* (1886), 103 N. Y., 626, 9 N. E., 505."

Mr Chief Justice Beard, in the case of *Thomas v. State*, 121 Tenn., 83, 113 S. W., 1041, 130 Am. St. Rep., 756, held that one introducing incompetent evidence

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over objection cannot complain that the court admitted evidence to rebut it.

The State relies upon a rule announced by the same learned judge in the case of *Scott v. Bank*, 123 Tenn., 287, 130 S. W., 757. The examiner in that case asked the witness to repeat just what had been brought out on original examination, thus again bringing into the record the testimony objected to. It was also found repeated in a written memorandum, which was made an exhibit to the deposition of the same witness. No effort was made to expunge from the record either this memorandum or the statement made on cross-examination. The two forms of evidence complained of were left in that record uninterfered with.

The instant case is further distinguished from *Scott v. Bank*, supra, in that the decision of the question raised herein is the admission of evidence claimed to be authorized under a new statute, and one involving the adoption of a new rule on a question of public policy. It is one that may frequently arise hereafter in the administration of the criminal law in this State.

The sixth and seventh assignments of error are therefore sustained.

The eighth assignment of error is that the court erred in refusing to set aside the verdict because the State was permitted, over the objection of defendant, to introduce by a third party a letter written by the defendant to his wife. This letter is set out in the assignment of error, but is too long to be copied herein. It was written from Charleston, Mo., by the

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defendant to his wife at Paris, Tenn., a great part of which is wholly immaterial and irrelevant. The only portions which we can see that would be injurious to the defendant are as follows:

“Edith, I will leave this country soon. I do not know where I will go, yet. . . . Edith, if Edna goes to court again and swears what she swore before, will cause me to have to move. Edith, if you care anything about my welfare, you do all you can to keep her from going to the next court. While I am not afraid of them catching me, I may be at home the first of next month; won't stay but a short time.”

It is most earnestly insisted by learned counsel for the defendant that the admission of said letter over his objection was error; it being a privileged communication between husband and wife and inadmissible, without any explanation being offered as to how the witness procured the letter. It was introduced by the State on redirect examination of Edna McChristian, who identified it as being in the handwriting of defendant, but who did not state where she obtained it.

The general and well-settled rule is that letters from one spouse to another are privileged, and fall within the privilege for confidential communications which obtains between husband and wife.

The authorities seem to be uniform that a third person may testify to an oral communication between husband and wife, although his presence was not known; but there is much diversity of opinion as to the right to introduce a writing from one to the other in the

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hands of a third person. *State v. Wallace*, 162 N. C., 622, 78 S. E., 1 Ann. Cas., 1915B, 425.

We find, upon investigation of the authorities, that there is a great diversity of opinion. Many cases like *Gross v. State*, 61 Tex. Cr. R., 176, 135 S. W., 373, 33 L. R. A. (N. S.), 477, and *Mercer v. State*, supra, maintain the rule that, if the statement is one about which the spouse cannot be examined as a witness, the shield of privilege is never laid aside, no matter into whose possession the communication, if in writing, may fall.

The wife of defendant testified that he told her he was guilty before she went with him to Missouri in June, 1913; that she stayed with him there until August, 1913, when she went on a visit to her folks in Tennessee, with the expressed intention of returning. The defendant testified that he wrote to his wife, and she to him, for several weeks after she left for a visit to her father's; that she would never live with him again, and that he had only seen her three or four times since, when he had only brief conversations with her.

The two letters from the defendant to his wife, introduced and sought to be introduced while her sister was on the stand, are dated September 21 and October 12, 1913. The wife must have received said letters, but it does not appear how they came into the possession of the prosecution.

When the hostile feeling that must have existed between her father's family and the defendant is considered, there can be but little doubt that it was

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through their influence that she did not return to live with her husband, as she had intended and as he expected. If such was their influence over her, the possession by the prosecution of his letters to her can be easily accounted for. Such possession could have been explained by the State, but it did not.

We have held that the wife would not be permitted, on the grounds of public policy, to testify as to what her husband told her. Does not the same rule require that, under the facts of this case, the letters received by her from him should not be introduced in evidence against him? We think so, and therefore sustain the eighth assignment of error.

The ninth assignment is also sustained for the same reason.

The tenth and eleventh assignments of error, in substance, are that a new trial should have been granted because the attorney-general below, in his argument to the jury, over objection duly made, read an excerpt from a letter which had been excluded by the court, and made a statement of "the famous *Cudahy* case in Kansas City," there being nothing in the record to sustain such argument. His statement of the *Cudahy* case is incorporated in the bill of exceptions, and while it, as well as the letter, were subsequently excluded from the jury, yet we think it was highly improper to have permitted the remarks used, especially as to said *Cudahy* case. We advert to those assignments to prevent a repetition of the conduct complained of on a retrial of the case.

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As this case may be tried again in the circuit court, we feel that we should not discuss the other assignments of error, as they deal only with the evidence and its weight.

Reverse and remand.

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LAMAR HEISKELL v. M. MORRIS, *et al.**

(Jackson. April Term, 1916.)

1. CORPORATIONS. Liability of shareholders for subscriptions.

Under a subscription contract, making all subscriptions contingent upon the whole amount being subscribed, no assessments can be enforced until the entire capital stock has been subscribed. (*Post*, p. 243.)

Cases cited and approved: *Read v. Memphis-Gayoso Gas Co.*, 56 Tenn., 545; *Anderson v. Railroad*, 91 Tenn., 44; *Newport, etc., Mill Co. v. Mims*, 103 Tenn., 466; *Pope v. Merchants' Trust Co.*, 118 Tenn., 506.

2. CORPORATIONS. Liability of shareholders for subscriptions.

Promoters who complete subscription by subscribing for the balance of unsold shares, intending to sell such shares to others, are liable for the amount so subscribed. (*Post*, p. 243.)

3. CORPORATIONS. Subscriptions to capital stock. "Procure."

A subscription contract, providing that all subscriptions are on condition that the promoters "procure" subscriptions to the full amount of the capital stock, *held* not to require that all subscriptions be made by persons other than the promoters. (*Post*, pp. 243, 244.)

4. CORPORATIONS. Liability of shareholders for subscriptions.

Subscriptions of corporate stock by insolvent persons cannot be counted to hold other subscribers for the amount of their subscriptions; but, if such subscriber was apparently solvent at the time he made the subscription, no fraud is perpetrated upon other subscribers by the acceptance of his subscription in good faith, though he afterward proves to have been insolvent. (*Post*, pp. 244-246.)

*On the question of fraud as a ground of relief from subscription to stock after insolvency of corporation, see note in 51 L. R. A. (N. S.), 900.

As to jurisdiction of equity to enforce liability on unpaid subscription to stock of a corporation see comprehensive note in 46 L. R. A. (N. S.) 440.

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Cases cited and approved: Belfast, etc., R. Co. v. Brooks, 60 Me., 568; La. Purchase Exposition Co. v. Kuenzel, 108 Mo., App., 105; Stone v. Monticello Construction Co., 135 Ky., 659; Morgan v. Landstreet, 109 Md., 558.

5. CORPORATIONS. Actions on subscriptions. Burden of proof.

The insolvency of a subscriber, as relieving other subscribers from obligation to pay subscriptions, is a matter of defense, the burden of proving which is on those subscribers asserting it. (*Post*, p. 246.)

6. CORPORATIONS. Subscriptions. Fraud. Laches of shareholder.

The shareholder, whose subscription is obtained through fraud, must be diligent in discovering the fraud and repudiating the contract, to avoid his subscription as against creditors of the corporation. (*Post*, p. 246.)

7. CORPORATIONS. Subscriptions. Fraud. Laches of shareholder.

Where subscribers for more than two years took no steps to repudiate subscriptions, but allowed their names to remain on the corporate books as shareholders, and paid one assessment, *held*, that they could not defeat an action by receiver to recover unpaid subscriptions on the ground of fraud. (*Post*, pp. 247, 248.)

Cases cited and approved: Chamberlain v. Trogden, 148 N. C., 139; Sanger v. Upton, 91 U. S., 56; Chubb v. Upton, 95 U. S., 667; Lantry v. Wallace, 97 Fed., 865; Upton v. Trilbilcock, 91 U. S., 45.

FROM SHELBY

Appeal from the Chancery Court of Shelby County.—J. ALLEN, Special Chancellor.

CARUTHERS EWING, for appellants.

R. P. CARY, for appellees.

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MR. JUSTICE GREEN delivered the opinion of the Court.

These suits were brought by the receiver of the United Investors' Company, an insolvent Tennessee corporation, to recover from the several defendants unpaid balances on their subscriptions to the capital stock of the corporation. The facts of each case are the same, and they were consolidated and heard together by the chancellor. There was a decree in favor of the complainant, and defendants have appealed.

The United Investors' Company was organized under the laws of Tennessee for the purpose of dealing in real estate at Memphis. Its capital stock was fixed at \$100,000, to be divided into one thousand shares, of \$100 each.

The concern was promoted by E. R. Parham and Burton B. Weil. They carried around the subscription list, and the said paper was headed by a subscription from Parham and Weil for seventy-five shares. The subscription list was dated October 30, 1912.

The first meeting of the incorporators was held February 15, 1913, by consent. At that meeting it appeared that subscriptions had been obtained for only seven hundred and forty shares. Counsel present advised the incorporators that the concern could not be legally organized until there were subscriptions for the entire one thousand shares. Parham and Weil then subscribed as trustees for the remaining two hundred and sixty shares. Notice had previously been

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sent to all the subscribers, and immediately following this meeting of the incorporators a stockholders' meeting was held and directors elected. A directors' meeting was then held and officers elected, and the corporation was formally launched into business.

The subscription agreement contained a stipulation that ten per cent. of the subscriptions were to be payable in cash upon organization of the company, and the balance was to be payable in noninterest-bearing installments of fifteen per cent. every six months until the entire subscription was paid. The agreement also contained this provision:

"This agreement is made upon the condition that said E. R. Parham and Burton B. Weil shall procure subscriptions to the full amount of the capital stock, to wit, \$100,000."

The minutes of the incorporators' meeting recited that the subscription book "was declared open and subscriptions for the capital stock were made by the parties whose names appear upon the subscription book, with the number of shares opposite their respective names in the following language." The subscription list then followed. The last subscription appearing is that of "Parham and Weil, Tr., two hundred and sixty shares." The minutes also set out "that one thousand shares have been subscribed for in full, and it was moved and seconded that the subscription book be closed." The stockholders' meeting which ensued was held upon three days' notice, and the

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minutes of the stockholders' meeting show that the action of the incorporators accepting the stock subscriptions was ratified and confirmed.

The corporation purchased a piece of real estate in Memphis, which it did not pay for. The vendor sold the lot and recovered judgment for balance of purchase money, unpaid by the proceeds of sale, against the corporation. The corporation having no assets visible, proceedings were had by which a receiver was appointed.

Burton B. Weil was made general manager of this corporation when organized, and the direction of its affairs intrusted to him. The first call of ten per cent. on their subscriptions was collected from all the stockholders, except from Parham and Weil. It seems that the second call was collected from some of the stockholders.

Defendants resist these suits upon the ground that the capital stock of the corporation never was fully subscribed; that the subscription of Parham and Weil for two hundred and sixty shares was fictitious; further charging that Parham and Weil were insolvent.

It is moreover contended in behalf of defendants that under the subscription agreement Parham and Weil were "to use their best endeavors to obtain subscriptions for stock," and that Parham and Weil were to "procure subscriptions to the full amount of the capital stock," and it is insisted that this language of the contract contemplated that Parham and Weil were to procure or obtain such subscriptions to the capital

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stock from others than themselves. Parham and Weil headed the list with a subscription for seventy-five shares, and it is urged that the terms of the agreement required them to procure all additional subscriptions necessary from others. It is accordingly said that their final subscription for two hundred and sixty shares as trustees was no compliance with the written specifications for the organization of this corporation.

As a matter of course, under this subscription contract and under the law, it was a condition of defendants' subscriptions to stock in this corporation, the capital of the corporation being fixed, that the whole amount of stock should be subscribed before a valid assessment could be levied upon them. *Read v. Memphis-Gayoso Gas Co.*, 9 Héisk. (56 Tenn.), 545; *Anderson v. R. R.*, 91 Tenn., 44, 17 S. W., 803; *Newport, etc., Mill Co. v. Mims*, 103 Tenn., 466, 53 S. W., 736; *Pope v. Merchants' Trust Co.*, 118 Tenn., 506, 103 S. W., 792.

We are unable to agree, however, that the necessary implication from this subscription contract was that all the stock except the seventy-five shares first taken by Parham and Weil was to be subscribed for by persons other than Parham or Weil. We are not able to give such construction to the words "procure" and "obtain."

The subscribers had a right to insist that the full amount of stock be taken by persons apparently solvent before such subscribers became liable for assessment. They had no right, however, to insist that any

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particular persons or class of persons be secured as subscribers. If Parham and Weil were apparently solvent, the provisions of this contract and of the law would be met if they procured or obtained themselves to subscribe for such an amount of stock as they were apparently able to pay for.

The evidence indicates that the incorporators supposed Parham and Weil took these two hundred and sixty shares for the purpose of selling to others, but it was assumed that Parham and Weil were primarily liable for this last subscription. As a matter of law, they were so liable, and if such subscription reasonably appeared to be within their financial ability, there was no infraction of defendants' rights by the acceptance thereof.

The subscription was not fictitious. Parham and Weil are liable thereupon, whatever they themselves may have intended.

There is no showing made by defendants that Parham and Weil were not solvent at this time, and not apparently able to take care of the subscription. Insolvent subscriptions to corporate stock cannot be counted, so as to hold other subscribers. The test, however, is the apparent solvency of the subscriber at the time the subscription was made by him. If the subscriber was apparently solvent, there is no fraud on other subscribers occasioned by the acceptance of his subscription in good faith, although afterwards he may prove insolvent.

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"Whether subscriptions by insolvent or irresponsible persons can be taken into consideration depends upon the circumstances. If they were not made and accepted in good faith, but with knowledge that the subscribers were insolvent and irresponsible, they cannot be counted. But it is otherwise if they were made by persons apparently solvent and able to pay, and accepted in good faith, although it may appear that the subscribers were and still are totally insolvent." 2 Clark & Marshall on Corporations, p. 1549.

"Fictitious subscriptions, or subscriptions made by persons unable to contribute their proportion of the capital, do not satisfy the requirement that the whole capital of a corporation shall be subscribed before its members can be assessed; but if the required number of subscriptions has been obtained in good faith from persons apparently able to perform their duties as shareholders, it is no defense to an action against a shareholder that some of the subscribers have proved to be insolvent." 1 Morawetz on Private Corporations, section 141.

See also 7 R. C. L., p. 234.

It has been held that the decision of the incorporators that the necessary amount of stock has been subscribed, and that the subscribers are responsible, is conclusive on these questions, in the absence of fraud on the part of such incorporators. *Belfast, etc., R. Co. v. Brooks*, 60 Me., 568; *Louisiana Purchase Exposition Co. v. Kuenzel*, 108 Mo. App., 105, 82 S. W., 1099. In the *Maine case* there appears to have been, how-

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ever, commissioners authorized by law to effect the organization of corporations.

But in *Stone v. Monticello Construction Co.*, 135 Ky., 659, 117 S. W., 369, 40 L. R. A. (N. S.), 978, 21 Ann. Cas., 640, it was held to be a question for the jury to determine the good faith of a subscription and to say whether the apparent financial ability of a subscriber was such as a person of ordinary prudence would have deemed reasonably sufficient to meet his assessments. See, also, note under *Morgan v. Landstreet*, 109 Md., 558, 72 Atl., 399, 130 Am. St. Rep., 531, as reported in 16 Ann. Cas., 1247, referring particularly to cases collected on page 1256.

We need not, however, determine whether the acceptance of the subscription of Parham and Weil, trustees, by the incorporators, was conclusive of their apparent solvency or not. If this question is open for review by the court, the solvency of such subscription is a matter of defense, and there is no proof whatever offered to sustain this defense. There is nothing to indicate that Parham and Weil were not actually solvent, as well as apparently solvent, at the time of the organization of this corporation.

We think that defendants are likewise precluded at this late date from relying on the matters urged in their behalf. The law is well settled that a shareholder whose subscription was obtained through fraud must be diligent in discovering the fraud and repudiating the contract, if he expects to avoid his subscription as against creditors of the corporation.

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This subscription was dated October 30, 1912. The corporation was organized February 15, 1913. These suits by the receiver were not brought for more than two years after organization, and prior to the bringing of the suits the defendants herein had taken no steps to repudiate their subscriptions, had allowed their names to remain on the books of the corporation as shareholders, and had paid the first assessment on their subscriptions. Such delay and laches on their part deprived them of the defenses they seek to make herein.

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion." *Newton Nat. Bank v. Newbegin*, 74 Fed., 135, 40 U. S. App., 1, 20 C. C. A., 339, 33 L. R. A., 727.

To the same effect, see *Chamberlain v. Trogden*, 148 N. C., 139, 61 S. E., 628, 16 Ann. Cas., 177; *Sanger v. Upton*, 91 U. S., 56, 23 L. Ed., 220; *Chubb v. Upton*, 95 U. S., 667, 24 L. Ed., 524; *Lantry v. Wallace*, 97

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Fed., 865, 38 C. C. A., 510; *Upton v. Tribilcock*, 91 U. S., 45, 23 L. Ed., 203.

See other cases collected in note in 16 Ann. Cas., 180.

For the reasons stated, we think there was no error in the decree of the chancellor, and the same must be affirmed.

There is, however, in the record a stipulation between counsel that defendants shall take no objection to the form in which these suits are brought, and that if complainant is successful no execution will issue on any judgment until proper steps are taken by complainant to equalize among all the subscribers to the capital stock of this corporation the burden of discharging its unpaid indebtedness. That such steps may be taken to equitably work out the rights of all parties interested, these causes will be remanded to the chancery court of Shelby county for further proceedings.

W. C. EARLY Co. v. R. S. WILLIAMS *et al.*

(Jackson. April Term, 1916.)

1. MORTGAGES. Assignment. Transfer of debt.

The lien of a mortgage or trust deed passes, without special assignment thereof, to the indorsee of a note or transferee of the debt secured by the instrument; the mortgage being transferred as incident to the debt. (*Post*, pp. 254-259.)

Cases cited and approved: *Clark v. Jones*, 99 Tenn., 639; *Bank v. Smith*, 107 Tenn., 483; *Central Trust Co. v. Stepanek*, 15 L. R. A. (N. S.), 1025; *Costello v. Meade*, 55 How. Prac. (N. Y.), 356; *Cornish v. Abington*, 4 Hurl. & N., 550; *James v. Morey*, 2 Cow. (N. Y.), 246; *Curtis v. Moore*, 152 N. Y., 159; *Windle v. Bonebrake*, (C. C.), 23 Fed., 165.

Cases cited and distinguished: *Nat. Live Stock Bank v. First Nat. Bank*, 203 U. S., 303; *Viele v. Johnson*, 15 Hun. (N. Y.), 332; *Viele v. Judson*, 82 N. Y., 32.

2. MORTGAGES. Assignment. Priorities. Effect of failure to record.

Assignments of mortgage need not be recorded to preserve priority over subsequent incumbrances. (*Post*, pp. 254-259.)

3. MORTGAGES. Release. Effect of satisfaction or release.

Where the holder of a mortgage has been induced by fraud to enter a discharge or release, if he does not take prompt steps to have his mortgage restored, he is estopped to assert its priority as against a subsequent purchaser or mortgagee relying on such cancellation. (*Post*, pp. 259-261.)

4. ESTOPPEL. Equitable estoppel. Intent.

To constitute estoppel, the act relied on must have been done with the knowledge or intent that it would be relied on. (*Post*, p. 261.)

Cases cited and approved: *Parkey v. Ramsey*, 111 Tenn., 308; *Morris v. Moore*, 30 Tenn., 433; *Collins v. Williams*, 98 Tenn., 531.

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5. ESTOPPEL. Equitable estoppel. Knowledge of facts.

It is essential to estoppel that the person claiming it was himself not only destitute of knowledge of the facts, but without available means of acquiring such knowledge; for there can be no estoppel where both parties have the same means of ascertaining the truth. (*Post*, p. 261.)

Cases cited and approved: *Crabtree v. Bank*, 108 Tenn., 492.

6. MORTGAGES. Release of assigned mortgage by mortgagee. Estoppel.

Where notes and a recorded trust deed of land securing them have been pledged as security for debt of payee thereof, his release on the record of the trust deed which recites facts showing the notes were negotiable and not then due does not affect the pledgee's right or priority over later incumbrancers who made no inquiry of the trustee as to ownership of the notes. (*Post*, pp. 261, 262.)

Cases cited and approved: *Roberts v. Halstead*, 9 Pa., 32; *Trust Co. v. Smythe*, 94 Tenn., 530; *Demuth v. Old Town Bank*, 85 Md., 315; *Swift v. Smith*, 102 U. S., 442; *Assets Realization Co. v. Clark*, 205 N. Y., 105.

FROM SHELBY

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
FRANCIS FENTRESS, Chancellor.

YANDELL HAUN, for plaintiff in error.

J. S. ALLEN, BYARS & CAPELL, McGEHEE & LIVINGSTON and G. J. McSPADDEN, for defendants in error.

W. C. Early Co. v. Williams.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

R. S. Williams, while doing a retail grocery business in Memphis, became indebted in an amount about \$2,500 to complainant company, a body corporate doing a wholesale grocery business. Williams sold his stock of groceries to Smith, and also sold and conveyed to Smith a lot upon which stood a house. The consideration for the stock of goods was about \$4,500, which was represented by a series of thirty-six negotiable notes of \$120.87 each executed by Smith to Williams. These notes were secured by a trust deed on the realty executed to one Kelley as trustee. Williams then placed in the hands of the complainant company these notes (along with the trust deed) by way of a collateral pledge to secure the payment of the trade debt above referred to due to complainant company.

It appears that Williams in the sale of the stock of groceries overreached Smith, who later became dissatisfied. In order to prevent litigation, the following arrangement with the assent of complainant was entered into: Smith was to convey back to Williams, or his wife, the real estate, but the deed was to be placed in the hands of Kelley, and there to remain until Williams could manage, by the execution of another trust deed, or otherwise, to have complainant company secured as to the payment of the trade debt, and procure the notes to be turned over to Smith for cancellation. Accordingly the deed for a conveyance of the realty

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to Mrs. Williams was drafted and signed by Smith. This deed, after acknowledgment by Smith, reached the hands of Kelley, who for some reason failed to hold it as agreed; on the contrary, he delivered it to Williams. This deed purported to vest the title in the wife of Williams to her sole and separate use, and was at once put to record. It recited a satisfaction of all the obligations which the trust deed to Kelley was executed to secure. It was not signed by Williams or by Kelley, in whom, as trustee, the legal title stood for the benefit of the holders of the notes. These notes, as seen, were yet held by the complainant in pledge. At this time no marginal release of the Kelley trust deed was entered on the registry books.

Later on Mrs. Williams incumbered the realty by a mortgage, and yet later she conveyed by a deed her equity of redemption. The persons taking these instruments from her claim to be innocent purchasers with rights superior to those of the complainant company. However, before the last-named instruments of incumbrance and of conveyance were accepted, it was required of Williams, the payee in the notes, that he sign a marginal release on the record opposite the trust deed to Kelley, trustee. This he did in the form following:

"I do declare that I am the true and lawful holder of the claim secured by the instrument within recorded and hereby acknowledge the satisfaction thereof and the discharge of the lien to secure the same in full. This 11th day of November, 1912. R. S. WILLIAMS."

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This release was an unauthorized, false, and fraudulent one. The chancellor held that, "while complainant, W. C. Early Company, has been horribly defrauded" by Williams, it was not entitled to have enforced the lien of the Kelley trust deed for the satisfaction of the notes to the extent of its account to which they were hypothecated. Further facts which the chancellor thought deprived complainant company of its remedy are:

The deed of Smith to Mrs. Williams was executed May 9, 1912. Complainant turned over to Williams the trust deed to be used as an aid in the drafting of this deed, but it retained the notes. Complainant learned about September 1, 1912, that Kelley had turned over to Williams the deed of reconveyance and that it had been recorded. However, the person who examined the title prior to the execution of the mortgage by Mrs. Williams on November 19th caused Williams to enter the marginal release on November 11th.

The chancellor was of opinion that when the deed of Smith to Mrs. Williams was recorded it showed a release of the lien of the Kelley trust deed; that on the discovery of its recordation complainant should have moved promptly in an action to have the record corrected; that the failure to do so before November 19th was laches that barred it in respect to an enforcement against the incumbrance of that date to one who trusted the record's showing at the time.

The court of civil appeals on appeal affirmed the decree of the chancellor; but we are of opinion that

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the rights of complainant company have been misconceived, and that the correctness of the decree cannot be maintained.

At the outset of the discussion of the relative rights of complainant, as the transferee and holder of the notes, and of the subsequent incumbrancer and grantee claiming priority, we should take note of the fact that in this State we have no statutory requirement that the assignee of notes secured by a mortgage or trust deed must, in order to the preservation of his lien as against third persons, record an assignment of the instrument which secures same. Several States have such statutes as parts of their recording systems, and the decisions in such States are to be noted for differentiation in many instances for that reason. It is a well-settled rule with us that the lien of a mortgage or trust deed passes, without a special assignment thereof, to the indorsee of a note or transferee of the debt secured by the instrument. The policy of the law is to treat the note as the principal thing and the mortgage as the incident—the transfer of the note secured as a transfer *pro tanto* of the incident, the lien of the mortgage. *Clark v. Jones*, 99 Tenn., 639, 27 S. W., 1009, 42 Am. St. Rep., 931; *Bank v. Smith*, 107 Tenn., 483, 64 S. W., 756.

In such case there is no active duty resting on the indorsee of a note to watch the record, to prevent incumbrances from going to record and becoming clouds on his rights thus fixed. When he invests on a clear record of title, he may rest quiescent. As was

said by Mr. Justice Peckham touching a claimed duty on the assignee's part in regard to his making the record show his assignment:

"There must be a law which provides for their record, either in express terms or by plain and necessary implication from the words stated. . . . There must be some legal duty imposed upon the assignee before the necessity arises for recording the assignment." *National Live Stock Bank v. First Nat. Bank*, 203 U. S., 303, 27 Sup. Ct., 79, 51 L. Ed., 192.

And see annotation of *Central Trust Co. v. Stepanek*, 15 L. R. A. (N. S.), 1025.

We think that the decrees of the lower courts were due to a misconception of certain cases urged on them by the counsel of the subsequent incumbrancer and grantee.

The chancellor (followed in the matter by the court of civil appeals) cited and quoted as below *Viele v. Johnson*, 15 Hun (N. Y.), 332, where the supreme court at general Term said in respect to the estoppel of an assignee by reason of a release of a mortgage entered by the mortgagee after the assignment:

"For, if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."

Seemingly the fact was not noted that this decision was on appeal reversed by the court of appeals in *Viele v. Judson*, 82 N. Y., 32, where this language was

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used, clearly announcing what we think is sound doctrine:

“The mortgage of plaintiff has priority over that held by Judson, unless there is force in the argument very ably pressed upon our consideration that Viele is estopped from enforcing his mortgage as against Judson by reason of his knowledge of the state of the record and his omission to correct it. That is the ground taken by the General Term, and very forcibly asserted in the opinion accompanying their judgment. The doctrine is broadly stated that, although the discharge was a fraud upon Viele, was perpetrated by other persons, without his previous knowledge or participation, the record cleared not by him or with his consent, he, having done or omitted no act up to the moment of the discharge, was nevertheless estopped, because, having learned the state of the record, he did not within a reasonable time either enforce his mortgage by foreclosure or bring an action to reinstate it upon the record; that is, a man may be estopped for not beginning a lawsuit. We cannot assent to this doctrine, unless the authorities are decisive in that direction. The case of *Costello v. Meade*, 55 How. Prac. (N. Y.), 356, appears to sustain the position. The discharge . . . (in that case) was, in fact, a forgery by which the record had been cleared. A subsequent incumbrance had been recorded, and because the prior mortgagee neglected to reinstate the record he was held to be stopped from enforcing his own security. The only authority upon which the decision

was rested appears to have been *Cornish v. Abington*, 4 Hurl. & N., 550. In that case the rule is stated that if any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends he shall do so or not, the person so conducting will not be permitted to gain-say the inference. The statement is well enough in its application to the facts of that case."

After analyzing the facts of the English case, and pointing out that the distinct fact which there worked the estoppel was silence when the defendant knew that it was being relied on to the hurt of the other, the situation originating a duty which the defendant owed to the plaintiff and of which he had actual knowledge, the opinion then, after citing other cases that involved the same distinctive features, proceeds:

"In all of them the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And in all the party maintaining silence knew that some one was relying upon that silence, and either acting or about to act as he would not have done had the truth been told. ' These elements are essential to create a duty to speak. We do not find them in the case at bar. The records which showed the discharge showed also its invalidity. The facts were all there, and needed only reasonable care to insure their discovery. . . . The danger lay in an inaccurate and incomplete search.

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Against that possibility the plaintiff was not bound to provide. Nobody relied on his silence or was misled by it. Judson was misled by the state of a part of the record, not by Viele's silence. He did not rely upon that, because he did not even know that Viele knew of the discharge. Indeed, for aught that appears, he did not know that there was such a man as Viele, much less than he was silent when he ought to have spoken, and so was justifying an inference. How can it be fairly said that Viele's silence operated as a fraud? It does not appear that he knew or suspected that a second mortgage was given, or even that there was such a man as Judson. The latter drew no inference from Viele's conduct, for he neither knew him nor his conduct. The inference he drew was wholly from the acts of other persons."

See, also, *James v. Morey*, 2 Cow. (N. Y.), 246, 14 Am. Dec., 475; *Curtis v. Moore*, 152 N. Y., 150, 46 N. E., 168, 57 Am. St. Rep., 506; *Windle v. Bonebrake* (C. C.), 23 Fed. 165; and other cases cited 15 L. R. A. (N. S.), p. 1033.

The quotation from the opinion has been made full because of its peculiar appositeness in its every comment on the facts to the phases of fact in the pending case. The parallel between the facts of the two cases as they relate to estoppel *in pais* is all but exact, and such quotation saves us a detailed recital of the evidence.

Both of the lower courts quote Jones on Mortgages, section 967, to sustain their position:

“The holder of the mortgage wrongfully discharged should therefore lose no time in taking steps to have his mortgage restored.”

This is true where the holder has by fraud been caused himself to enter a discharge or release. He then, of course, knows of the dangerous situation his own act has created. But, if the quotation had been made fuller, it would have disclosed that Mr. Jones coincides in opinion with the New York court of appeals, as follows (*italics ours*):

“As between a mortgagee whose mortgage has been discharged of record *solely through the act of a third party*, which act was unauthorized by the mortgagee, and for which he was in no way responsible, and a person has been *induced by such cancellation* to believe that the mortgage has been canceled in good faith, and has dealt with the property by purchasing the title or accepting a mortgage thereon as security for a loan, the equities are balanced. In such case the rights will be settled in the order of time, and the prior mortgage must remain despite the apparent discharge. If, however, the mortgagee is in any way responsible for the mortgage being released of record, or if the release of record is procured through the neglect, incaution, credulity, or misplaced confidence of the mortgagee, a different rule will govern in determining the equities,” etc. 2 Jones on Mortgages (7th Ed.), section 967; 20 Am. & Eng. Enc. L. (2d Ed.), 1073.

In the instant case complainant company did nothing to facilitate the fraud committed on itself. Parting with the trust deed for the purpose stated was meaningless in the matter of an equitable estoppel, under the rule in this State already adverted to. Kelley was not the agent of complainant, but the regular counsel of Williams and employed and paid to draft the deed of Smith to Mrs. Williams by Smith on the insistence of Williams.

Further, and particularly, the later incumbrancer and grantee did not rely upon the deed to Mrs. Williams or its recitals as constituting a discharge of the lien. As already seen, Williams was required to enter a marginal release on November 11th before the title would be passed. It was this marginal release that was relied on by the later incumbrancer; but it was not known to complainant company before the subsequent incumbrancer had acted to her own hurt on the 19th. In the circumstances stated, and as above indicated, how can it be justly urged that complainant company is equitably estopped? Williams was not even a mortgagee proper; the legal title to the realty stood vested in Kelley, trustee. Neither Williams nor Kelley signed the deed to Mrs. Williams to operate as a discharge or an apparent discharge in their names; and it is difficult to conceive how Smith by his own recitals in his deed could even apparently discharge a lien against his own property so as to mislead. If the deed to Mrs. Williams could not reasonably and did not in

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fact mislead, how can an estoppel of complainant be predicated upon it?

The principle upon which the above authorities decline to apply the rule of estoppel *in pais* has been more than once recognized in this State:

(a) The act relied on must have been done with the knowledge or intent that it would be relied on by the other. *Parkey v. Ramsey*, 111 Tenn., 308, 76 S. W., 812; *Morris v. Moore*, 11 Humph. (30 Tenn.), 433; *Collins v. Williams*, 98 Tenn., 531, 41 S. W., 1056.

(b) It is essential to the estoppel that the person claiming to have been influenced to his detriment was himself not only destitute of knowledge of the state of facts, but was also without available means of acquiring such knowledge. Where both parties have the same means of ascertaining the truth, there can be no estoppel. *Crabtree v. Bank*, 108 Tenn., 492, 67 S. W., 797; *Collins v. Williams*, *supra*.

Although the notes secured by the trust deed were negotiable in form and were far from being due, and were indicated so to be by the recitals of the trust deed to Kelley, the subsequent incumbrancer and grantee made no inquiry of Kelley, who could have given information that the notes were pledged with complainant; and no effort was at any time made to have Williams or wife exhibit the notes. We have seen that complainant, which acquired the notes on a clear record, had a right to assume that its right to the security of the lien would not be disturbed by later entries on the record. But the present estoppel asserters had

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not made an investment; they were in motion, not entitled to be quiescent; and, being so in motion, the duty of making inquiry was on them to earn the *status* of innocent purchaser, on a record at least to be deemed clear, for their sake. This they have not done. *Roberts v. Halstead*, 9 Pa., 32, 49 Am. Dec., 541, cited with approval in *Trust Co. v. Smythe*, 94 Tenn., 530, 29 S. W., 903, 27 L. R. A., 663, 45 Am. St. Rep., 748; *Demuth v. Old Town Bank*, 85 Md., 315, 37 Atl., 266, 60 Am. St. Rep. 322; *Swift v. Smith*, 102 U. S., 442, 26 L. Ed., 193; *Assets Realization Co. v. Clark*, 205 N. Y., 105, 98 N. E., 457, 41 L. R. A. (N. S.), 462, and cases cited.

Believing its rulings to have been erroneous in the respects indicated, the decree of the court of civil appeals is reversed, on grant of the writ of *certiorari*; and the cause is remanded to the chancery court of Shelby county for a decree in favor of complainant and proceedings thereunder for the subjection of the collateral. So ordered.

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IDA M. MOYERS *et al.* v. CITY OF MEMPHIS.*

(*Jackson.* April Term, 1916.)

1. ATTORNEY AND CLIENT. United States. Powers of congress.

Congress has the power to determine the conditions upon which the government will consent to be sued, or upon which it will grant pensions or other bounties, or prescribe conditions upon which attorneys will be allowed to represent claimants or litigants before any of the courts of the government, within certain reasonable limitations, if done by general laws applicable to all alike, and in advance of the services rendered in such courts. (*Post*, pp. 289, 290.)

Acts cited and construed: Acts 1887, ch. 359; Acts 1861, ch. 45; Acts 1891, ch. 496.

Cases cited and approved: *Printing & N. Registering Co. v. Sampson*, L. R., 19 Eq., 465; *McGowan v. Parish*, 237 U. S., 285; *Wylie v. Coxe* (1853), 15 How., 415; *Wright v. Tebbitts*, 91 U. S., 252; *Stanton v. Embry*, 93 U. S., 548; *Taylor v. Bemiss*, 110 U. S., 42; *Ball v. Halsell*, 161 U. S., 72; *Mayton v. Raymond*, 4 Am. L. Times (N. S.), 21; *McPherson v. Cox*, 6 Otto (96 U. S.), 404; *Nutt v. Knut*, 200 U. S., 12; *Moyers v. Fahey*, 43 Wash. L. Rep., 691; *Frisbie v. U. S.*, 157 U. S., 160; *Fitzgerald v. Grand Trunk Railroad*, 63 Vt., 169; *Parker v. Davis*, 79 U. S., 457; *L. & N. R. R. Co. v. Mottley*, 219 U. S., 467; *Walles v. Smith*, 157 U. S., 271; *Ralston v. Dunaway*, 184 S. W., 425.

Cases cited and distinguished: *Lochner v. New York*, 198 U. S., 45; *Allgeyer v. Louisiana*, 165 U. S., 589; *Williams v. Fears*, 179 U. S., 270; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S., 211; *Railroad v. Voigt*, 176 U. S., 498; *Ball v. Halsell*, 161 U. S., 72; *McMicken v. Perin*, 18 How., 507; *In re Paschal*, 10 Wall., 483; *Stanton v. Embry*, 93 U. S., 548; *Matthews v. People*, 202 Ill., 389.

*On the question of validity of statutory provision for attorney's fees see note in 17 L. R. A. (N. S.), 910.

As to right of attorney who takes case on contingent fee or for certain percentage to implied or equitable lien on fund recovered, see note in 27 L. R. A. (N. S.), 634.

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2. CONSTITUTIONAL LAW. Liberty of contract. Regulation. Powers of congress.

Congress has the power to regulate and restrain the conduct and contracts of all persons for the common good, the possession and enjoyment of liberty and property being subject to such reasonable conditions as may be essential to the safety, health, peace, good order, and morals of the community. (*Post*, p. 290.)

3. CONSTITUTIONAL LAW. Powers of congress. Liberty of contract.

The liberty of contract is one of the inalienable rights of a citizen, embracing as it does, the right to enter a lawful calling and to acquire and dispose of property, so that a general prohibition against entering into contracts with respect to property is unconstitutional and void. (*Post*, pp. 290, 291.)

4. CONSTITUTIONAL LAW. Due process of law. Construction.

The due process of law clauses of the federal Constitution, while designed to preserve life, liberty, and property inviolate against arbitrary power, were not intended to interfere with the police power of the different States. (*Post*, pp. 291, 292.)

5. CONSTITUTIONAL LAW. Liberty of contract. Regulation. Powers of congress.

Liberty of contract and right of property are not absolute and universal, in spite of the Fifth and Fourteenth Amendments to the United States Constitution, and it is within the power of the government to restrain some individuals from all contracts, as well as all individuals from some contracts. (*Post*, pp. 291, 292.)

6. ATTORNEY AND CLIENT. Compensation. Contingent fees. Legality.

A contract between an attorney and a city, by which the attorney is to receive fifty per cent. of the amount collected from the government on a claim arising out of the Civil War, is legal and valid, and not against public policy. (*Post*, pp. 292, 293.)

7. ATTORNEY AND CLIENT. Constitutional law. Powers of congress. Depriving of property.

Act Cong. March 4, 1915, chapter 140, section 4, 38 Stat. 996, prohibiting and amount in excess of twenty per cent of the

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amount collected to be paid to the attorney collecting Civil War claims included under the bill, is unconstitutional and invalid, under Const. U. S. Amend. 5, as to attorneys who have performed their services and secured the allowance of claims prior to its enactment, since they have then a vested property right, which cannot be destroyed by arbitrary act of Congress. (*Post*, pp. 292, 293.)

Act cited and construed: Acts 1915, ch. 140.

8. ATTORNEY AND CLIENT. Compensation. Contingent fees.

While the courts do not always favor contingent fees, and look with some suspicion upon them, especially where the amount agreed to be paid represents fifty per cent. of the total claim, still the trend of judicial decision is in favor of upholding and enforcing such contracts, where no question of fraud, misrepresentation, or unfair dealing is raised. (*Post*, p. 293.)

9. UNITED STATES. Claims against United States. "Gift." "Bounty."

An amount appropriated under Act March 4, 1915, to repay the city of Memphis for the rental value of land taken for a navy yard during the Civil War is not a gift or bounty, but is in the nature of a debt supported by good and valuable consideration. (*Post*, pp. 293, 294.)

FROM SHELBY

Appeal from the Chancery Court of Shelby County.
—I. H. PERES, Special Chancellor.

NEUHARDT & ANDERSON and C. F. CONSAUL, for appellant.

C. M. BRYAN, for appellees.

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MR. W. H. SWIGGART, Special Judge, delivered the opinion of the Court.

This case was submitted to the chancery court of Shelby county on an agreed state of facts, under section 5206 of Shannon's Code, and without any formal pleadings. This section is as follows:

"The same parties who are entitled to enter into an agreement of submission to arbitration, may, in like manner, with or without action brought, agree upon a case containing the facts upon which the controversy depends, and submit the same to the circuit or chancery court of the county in which either of the parties resides, or in which a suit might have been brought to determine such controversy."

The necessary affidavit that the controversy was real, and the proceedings in good faith, and the bond required under the following sections of the Code were made, so that the chancery court had jurisdiction of the controversy.

The chancellor decided in favor of complainants, and the city of Memphis has appealed from the decree to this court.

The only issue involved is whether section 4 of the Act of Congress of March 4, 1915 (38 Stat. 962), is a valid and constitutional enactment. This act was passed by the Congress of the United States appropriating the money and authorizing the secretary of the treasury to pay the claimants, whose names are set out in the act, the several sums appropriated

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therein; the claims provided for being divers and numerous "war claims," most of which had been adjudicated and allowed by the court of claims, at various times in the past. It is the statute which is often referred to as the "Omnibus Bill." Section 4 of this act is as follows:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered, or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

By the signed agreement, upon which the case is submitted to the court, it appears that in December, 1876, the city of Memphis employed Gilbert Moyers, an attorney of Washington, D. C., to prosecute a certain claim against the United States for the occupation and use of certain real estate in Memphis, formerly known as part of the "Navy Yards," which property belonged to the city; that Gilbert Moyers,

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after several years' delay, succeeded in having this claim submitted to the court of claims for its adjudication, and soon thereafter died. Complainants are practicing attorneys of the city of Washington, being the daughter and son-in-law of Gilbert Moyers, and also administrators of his estate. After the death of Gilbert Moyers the city of Memphis employed complainants to continue the prosecution of this claim as attorneys for the city, and agreed with them that they should have fifty per cent. of the amount collected on this claim as their compensation or fee. Complainants took proof in the case, prepared and filed briefs, and argued the case before the court of claims, and finally obtained an adjudication in favor of the city for the sum of \$21,192.88, in the year 1905. This judgment was certified by the court of claims to the senate about December, 1905. No appropriation was made to pay this claim until the passage of the act of 1915, heretofore mentioned, when provision was made for its payment, along with many other claims of like character, by said act of Congress.

After this act was passed, and the money appropriated to pay the claim, in view of section 4 of the act quoted above, the complainants collected on their fee only twenty per cent. of the amount of the claim, and the city collected eighty per cent. thereof; that is, a treasury warrant was issued in favor of the city for \$16,954.31, and another warrant was issued to complainants for \$4,238.57, being twenty per cent., the amount provided for by the statute. Said latter war-

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rant was accepted by complainants, with the express reservation of their right to demand payment of the full fifty per cent. of the claim, and without waiving their right to do so. The sum remaining unpaid on account of this fee originally agreed on between the parties is \$6,357.86. The sole ground for refusing to pay this amount now claimed by complainants was the provision in said statute limiting the amount of the fees of attorneys to twenty per cent. of the claim. It is stated in the agreement of the parties:

“That if said enactment limiting counsel fees to twenty per centum of collection is valid, then complainants are entitled to take nothing by this suit; that if said enactment in its effect upon the rights of complainants herein is unconstitutional, then complainants are entitled to a decree in said sum of \$6,357.86.”

The claim in question was referred to the court of claims under the act of Congress of 1887 (Act March 3, 1887, chapter 359, 24 Stat. 505), commonly called the “Tucker Act.” It was further agreed by complainants, at the time they were employed to prosecute said claim, that they were to hold the city free from any claim against it by the estate of Gilbert Moyers, deceased, on account of any services rendered by him during his lifetime.

It is not claimed by the city that complainants did not perform the services which they undertook in a proper and successful manner; and no effort is made to defeat the claim now presented on the ground that

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the fee contracted for was excessive, or unreasonable, or extortionate. No such question is raised by the city.

The only question, therefore, is whether the city can lawfully pay, and the complainants lawfully receive, the additional thirty per cent. of said claim, under section 4 of the appropriation act heretofore quoted.

Complainants alleged that said act, attempting to limit counsel fees in the matter of claims included therein, so far as said limitation would operate to deny to them the fee agreed on, by contract, and whereunder their services had been fully rendered prior to said act, in a proper manner before said court of claims, is unconstitutional and void, as being in contravention of the terms of the Fifth Amendment to the Constitution of the United States, in that its provisions attempt to deprive complainants of their liberty to enforce a valid contract under which the consideration had passed from them to the other contracting parties, and also in that its provisions attempt to deprive them of their property rights without due process of law.

The latter part of the Fifth Amendment of the Constitution of the United States provides that:

No person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the Constitution provides:

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"Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In *Adair v. United States*, 208 U. S., 161, 28 Sup. Ct., 277, 52 L. Ed., 436, 13 Ann. Cas., 764, the court, having under consideration the constitutionality of Act June 1, 1898, chapter 370, 30 Stat., 424, concerning carriers engaged in interstate commerce, and their employees, said:

"The first inquiry is whether the part of the tenth section of the act of 1898, upon which the first count of indictment was based, is repugnant to the Fifth Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good."

It was further said, by the court in that case, quoting from Cooley on Torts, p. 278, that:

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"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result, of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others he is entitled to redress."

The court cited *Lochner v. New York*, 198 U. S., 45, 25 Sup. Ct., 539, 49 L. Ed., 937, 3 Ann. Cas., 1133, which involved the validity of a state enactment prescribing maximum hours for labor in bakeries, and quoted from that opinion as follows:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. . . . Under that provision no State can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."

The court further said, in the *Adair Case*:

"In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police

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power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."

Without quoting all the pertinent language in this opinion, it is sufficient to say it cites quite a large number of cases for the position that the employer and employee have equality of right as to the making of contracts, and that any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land.

In *Allgeyer v. Louisiana*, 165 U. S., 589, 17 Sup. Ct., 431, 41 L. Ed., 832, the supreme court, discussing the Fourteenth Amendment of the federal Constitution, said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avoca-

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tion, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

The court further said in that case:

"In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State."

In *Lochner v. New York*, 198 U. S., 47, 25 Sup. Ct., 539, 49 L. Ed., 937, 3 Ann. Cas., 1133, the supreme court of the United States held that the limitation of employment in bakeries to sixty hours a week and ten hours a day, attempted by chapter 415, Laws of 1897, of the State of New York, was an arbitrary interference with the freedom to contract which is guaranteed by the Fourteenth Amendment of the Constitution, and is not sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare.

The court in that case said:

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“We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go.”

In *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct., 128, 45 L. Ed., 186, the supreme court of the United States said:

“And so as to the right to contract. The liberty, of which the deprivation without due process of law is forbidden, ‘means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.’ ”

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In *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 20 Sup. Ct., 96, 44 L. Ed., 136, the court discusses the question of whether private contracts may be avoided on account of legislation under the interstate commerce clause of the Constitution. The court said:

“There is no intimation in this remark that Congress has no power to legislate regarding those contracts which do directly regulate and restrain interstate commerce. The inference is quite the reverse, and it is plain that the case assumes, if private contracts, when entered into, do directly interfere with and regulate interstate commerce, Congress had power to condemn them. If the necessary, direct, and immediate effect of the contract be to violate an act of Congress, and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. . . .

“Where the contract affects interstate commerce only incidentally, and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce, is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate

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upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants."

In *Baltimore & Ohio Southwestern Ry. Co. v. Voigt*, 176 U. S., 498, 20 Sup. Ct., 385, 44 L. Ed., 560, the supreme court, again discussing the question of the power of Congress to control certain contracts, said:

"The principles declared in those cases (cases cited) are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing & Registering Co. v. Sampson*, L. R., 19 Eq., 465; 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and

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shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.’ ’

In the case of *McGowan v. Parish*, 237 U. S., 285, 35 Sup. Ct., 543, 59 L. Ed., 955, the supreme court recognized and enforced an attorney’s fee contract, based upon a contingent amount depending on the amount collected, for services in prosecuting a claim against the government. While there was no direct discussion of the point, the contract for a contingent fee was recognized as valid, and was enforced. The amount contracted for in that case by the attorney was fifteen per cent. of the recovery, upon a claim of about \$181,000.

In *Ball v. Halsell*, 161 U. S., 72, 16 Sup. Ct., 554, 40 L. Ed., 622, a contract for the payment of fifty per cent. of claims to be prosecuted against the government on account of Indian depredations was held illegal, in view of the facts of that case, and in view of the statute of March 3, 1891 (26 Stat., 851, chapter 538), applying to that class of claims. This statute provided for the adjudication and payment of claims arising from Indian depredations, and it was provided by section 9 that:

“All sales, transfers or assignments of any such claims, heretofore or hereafter made, except such as have occurred in the due administration of decedents’ estates, and all contracts heretofore made for fees and allowances to claimant’s attorneys, are hereby declared void; and all warrants issued by the secretary

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of the treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors or administrators, or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys; and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case, and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent. of the judgment recovered except in case of claims of less . . . than \$500, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent. of such judgment shall be allowed by the court."

This statute was upheld in the case referred to. The court said:

"This act was passed before the attorney had either recovered or received any money upon the principal's claim against the United States. The act did not recognize either the lawfulness or the amount of the claim, or make any appropriation for its payment. But it provided for its ascertainment and adjudication by judicial proceedings, and for the allowance, by the judgment in those proceedings, of a reasonable compensation to the attorney. The restriction of the compensation of attorneys to the amounts so allowed by

the court was one of the terms and conditions upon which the United States consented to be sued."

But the court, in that case, further said:

"By several decisions of this court, indeed, beginning at December term, 1853, contracts for contingent fees, by which attorneys, employed to prosecute claims against the United States, were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid. *Wylie v. Coxe* (1853), 15 How. (56 U. S.), 415, 14 L. Ed., 753; *Wright v. Tebbitts* (1875), 91 U. S., 252, 23 L. Ed., 320; *Stanton v. Embry* (1876), 93 U. S., 548, 23 L. Ed., 983; *Taylor v. Bemiss* (1883), 110 U. S., 42, 3 Sup. Ct., 441, 28 L. Ed., 64. The reason for upholding the validity of such contracts was first stated by Mr. Justice Miller, in *Taylor v. Bemiss*, as follows: 'The well-known difficulties and delays in obtaining payment of just claims, which are not within the ordinary course of procedure of the auditing officers of the government, justifies a liberal compensation in successful cases, where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means, residing far from the seat of government, who can give neither money nor personal attention to securing their rights.' 110 U. S., 45, 3 Sup. Ct., 443, 28 L. Ed., 65. The proportion allowed to the attorneys, in *Wylie v. Coxe*, was one-twentieth; in *Wright v. Tebbitts*, one-tenth; in *Stanton v. Embry*, one-fifth; and in *Taylor v. Be-*

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miss, one-half." *Ball v. Halsell*, 161 U. S., 72, 80, 16 Sup. Ct., 554, 556, 40 L. Ed., 623, 624.

In a note to *McMicken v. Perin*, 18 How., 507, 15 L. Ed., 504, it is said:

"An agreement to give plaintiff's attorney part of the recovery is valid."

Also:

"An agreement by an attorney to conduct a suit and give the plaintiff a fixed share of the proceeds after paying expenses has been sustained."

Also:

"An agreement between attorney and client, fairly made, for contingent fees, will be sustained both in law and equity."

Also:

"There is nothing illegal, immoral, or against public policy in an agreement by an attorney at law to present and prosecute a claim, either at a fixed compensation or for a reasonable percentage upon the amount recovered, *Wright v. Tebbitts*, 1 Otto (91 U. S.), 252, 23 L. Ed., 320; or for a contingent compensation, *Stanton v. Embry*, 3 Otto (93 U. S.), 548, 23 L. Ed., 983; or to carry on the suit at their own costs and charges, and have one-half of the amount recovered, *Mayton v. Raymond*, 4 Am. L. Times (N. S.), 21. See *McPherson v. Cox*, 6 Otto (96 U. S.), 404, 24 L. Ed., 746."

It is provided by the United States statute that:

"Nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to

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and receiving from their clients other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties." Rev. St. U. S. sec. 823 (Act Feb. 26, 1853, chapter 80, 10 Stat. 161 [U. S. Comp. St. 1913, sec. 1375.])

In *Nutt v. Knut*, 200 U. S., 12, 26 Sup. Ct., 216, 50 L. Ed., 348, the direct question of the validity of a fee contract providing for thirty-three and one-third per cent. of the amount recovered, for prosecuting a war claim against the government, was involved. The contract in that case also stipulated that the fee should be a lien upon the claim, and upon any draft, money, or evidence of indebtedness issued thereon. The defense was based in part upon section 3477 of the Revised Statutes (U. S. Comp. St. 1913, sec. 6383), which declares null and void certain transfers and assignments of claims against the United States. The supreme court held that part of the contract undertaking to fix a lien on the claim was in contravention of said section of the Revised Statutes, and therefore void; but it further held that this provision of the contract did not vitiate the entire contract, and that the contract stipulating for the payment of a fee of thirty-three and one-third per cent. of the claim allowed was valid. The court said:

"Such an agreement did not give the attorney any interest of share in the claim itself, nor any interest in the particular money paid over to the claimant

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by the government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions."

In *Re Paschal*, 10 Wall., 483, 19 L. Ed., 992, the supreme court, speaking as to the rights of counsel to collect fees, said:

"The lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot be well distinguished. And, as a general rule, counsel fees, as well as those of attorney or solicitor, constitute a legal demand for which an action will lie. And whilst, as between party and party in a cause the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client a different rule obtains. The claim of the attorney or solicitor in the latter case, even in England, extends to all proper disbursements made in the litigation, and to the customary and usual fees for the services rendered.

"The fee bill adopted by Congress in 1853 recognizes this general rule, and in fact adopts it. By the first section of that act, it is expressly declared that nothing therein shall be construed to prohibit attorneys, solicitors, and proctors from charging to

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and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.”

In *Stanton v. Embry*, 93 U. S., 548, 23 L. Ed., 983, suit was brought to recover for services rendered by an attorney in prosecuting a claim against the United States, before the treasury department. Defendants objected that the contract relied on in the declaration was one for contingent compensation. The supreme court said:

“Such a defense, in some jurisdictions, would be a good one; but the settled rule of law in this court is the other way. Reported cases to that effect show that the proposition is one beyond legitimate controversy. *Wylie v. Coxe*, 15 How., 415, 14 L. Ed., 753; *Wright v. Tebbitts*, 91 U. S., 252, 23 L. Ed., 320.

“Professional services were rendered by an attorney, in the first case cited, in prosecuting a claim against the Republic of Mexico, under a contract that the attorney was to receive five per cent. of the amount recovered.”

The court goes on to show that, in both the cases referred to, the contracts for contingent fees were upheld. In that case the supreme court sustained the propositions that professional services are as legitimate as services rendered in court, where they are rendered in preparing and advocating a just claim, that in such matters parties required the aid of

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advocates, and that the legal profession have a right to accept such employment and receive compensation for their services, and that the courts cannot adjudge such contracts illegal, if free from fraud, misrepresentation, and unfairness. 93 U. S., 548-558, 23 L. Ed., 983.

In *Moyers et al. v. Fahey*, 43 Wash. L. Rep., 691, the supreme court of District of Columbia, in a well-considered opinion, held that section 4 of the act now in question was unconstitutional, as violative of the Fifth Amendment of the Constitution, as applied to the facts of that case, which were practically the same as in the present case.

In *Matthews v. People*, 202 Ill., 389, 67 N. E., 28, 63 L. R. A., 73, 95 Am. St. Rep., 241, it was said:

"It is now well settled that the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate section 2 of article 2 of the Constitution of Illinois, which provides that 'no person shall be deprived of life, liberty or property without due process of law.' It is equally a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law."

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But defendant's solicitor, in his able brief, cites and relies on numerous cases, where the supreme court has held that the liberty of contract and right of property are subject to certain regulations and control. *Frisbie v. U. S.*, 157 U. S., 160, 15 Sup. Ct., 586, 39 L. Ed., 657, was a case sustaining the right to regulate and control fees in pension cases, and announcing that no pensioner has a vested, legal right in his pension, and that pensions are bounties, which Congress may give or withhold at its discretion. *Fitzgerald v. Grand Trunk Railroad*, 63 Vt., 169, 22 Atl., 76, 13 L. R. A., 70, was an action to recover a rebate on a shipping contract made before the Interstate Commerce Act was passed. But it was held that such contracts were made subject to the right of Congress to legislate on that subject and to control interstate commerce, in the interest of the public. The Legal Tender cases of *Knox v. Lee* and *Parker v. Davis*, 79 U. S. (12 Wall.), 457, 20 L. Ed., 287, are relied on by defendant; but these cases were based on the power of Congress to regulate the coinage of money and the value thereof, and we think they are not in point here. So the case of *L. & N. R. R. Co. v. Mottley*, 219 U. S., 467, 31 Sup. Ct., 265, 55 L. Ed., 297, 34 L. R. A. (N. S.), 671, is not controlling, as it was based on the power of Congress to regulate interstate commerce between the States, under that clause of the Constitution.

Wailles v. Smith, Comptroller, 157 U. S. 271, 15 Sup. Ct., 624, 39 L. Ed., 698, is also cited and relied

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on by defendant. It appears that in 1878 the legislature of Maryland authorized Mr. Wailes to prosecute, on behalf of the State, all of the "claims of the State against the government of the United States, and he is hereby allowed a commission of thirty per cent. upon any sum that shall be recovered by him and paid by the government of the United States into the treasury of the State of Maryland, as full compensation for his services and expenses in the prosecution of said claims of said State against the United States," etc. The third section of the act directed the comptroller of the treasury to issue his warrant to pay said Wailes a commission of thirty per cent. on such sum as shall be recovered by him and paid by the government into the treasury. Laws of Maryland 1878, chapter 224.

In 1891, the amounts which had been collected from the several States and territories under the Direct Tax Act of 1861 (Act Aug. 5, 1861, chapter 45, 12 Stat. 292) were refunded. The act of Congress (Act March 2, 1891, chapter 496, 26 Stat. 822) authorizing the same contained the proviso:

"That no part of the money hereby appropriated shall be paid out by the governor of any State or territory or any other person to any attorney or agent under any contract for services now existing or heretofore made between the representative of any State or territory and an attorney or agent."

The act further provides that no money should be paid to any State under this act—"until the legis-

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lature thereof shall have accepted, by resolution, the sum herein appropriated, and the trusts imposed, in full satisfaction of all claims against the United States on account of the levy and collection of said tax, and shall have authorized the governor to receive said money for the use and purposes aforesaid."

The general assembly of Maryland accepted these terms and provisions, and received from the federal government \$371,299, and directed that it be applied in payment of the State debt and to the sinking fund. The plaintiff, Wailes, began proceedings by petition for mandamus against the State comptroller, to compel him to draw a warrant on the treasurer in his favor for thirty per cent. of the money which had been so paid into the State treasury by the federal government. The petition was dismissed, and affirmed by the supreme court of Maryland; and thereupon a writ of error was sued out, and the case carried to the supreme court of the United States. It was held that the motion to dismiss must prevail; that the judgment of the court of appeals of Maryland, that there was no ministerial duty resting on the comptroller to draw his warrant in favor of the plaintiff in error, because no appropriation had been made by the general assembly for the payment of his claim, was clearly decisive of the controversy. The court did also say that this money passed to the State with the express obligation not to make this deduction, and the State's acceptance of it bound her to the condition imposed, and that she could not accept the gift,

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and at the same time repudiâte the condition. The court further said:

“As the State, when she took the money, was bound by the condition upon which the payment was made, so the plaintiff in error, if he made the collection, is equally bound thereby.”

We think the actual decision of that case was predicated upon other grounds, and that the language of the court quoted was perhaps only a dictum of the court; still, in view of the express provision of the act of Congress, under which the payment was made, the case is not conclusive as an authority in the present case. The express conditions under which the payment was made, as set out in the act of Congress, and the acceptance of these conditions by the State of Maryland, were controlling on the point in question.

Other authorities have been cited in defendant's brief. We think, however, that they are to be distinguished from the instant case, and are not controlling.

We note, however, that the supreme court of Arkansas, in *Ralston v. Dunaway*, 184 S. W., 425 (Advance Sheets, May 3, 1916), has passed upon the question, and held that section 4 of the appropriation act of 1915, now in question, was constitutional and binding upon the parties in that case. After reviewing that case, we are not convinced of its soundness.

We do not doubt that Congress has power to determine the conditions upon which the government

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will consent to be sued, or the conditions upon which it will grant pensions or other bounties, or that it may prescribe the conditions upon which attorneys will be allowed to represent claimants or litigants before any of the courts of the government, within certain reasonable limitations, and where this is done by general laws, applicable to all alike, and in advance of the services rendered in such courts. We think Congress may control the terms upon which attorneys may appear in the courts or before the departments of the government, to represent its wards, such as the Indian tribes, or its pensioners.

We do not doubt that Congress has the power to regulate and restrain the conduct and contracts of all persons for the common good. The possession and enjoyment of "liberty" and "property" are, of course, subject to such reasonable conditions as may be essential to the safety, health, peace, good order, and morals of the community. The freedom to use one's faculties or earn one's living in all lawful ways extends only to the point where private right becomes secondary to the public good, and the inquiry still remains whether the particular calling in which the citizen proposes to engage, or the particular contract or right which he proposes to assert, is consistent with such rules of action as have been rightfully prescribed by the State or government. See 5 Enc. U. S. Supreme Court Reports, 555, and cases cited.

"The liberty of contract is one of the inalienable rights of a citizen. The right to pursue a lawful

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calling embraces the right to enter into all contracts proper, necessary, and essential to the carrying out of the purpose of such calling, and the possession of property, of which a person cannot be deprived, implies the right to acquire and dispose of property; and as property can only be acquired and disposed of, as between living persons, by contract, a general prohibition against entering into contracts with respect of property, or having as their object the acquisition of property, would be held to be unconstitutional and void." 5 Enc. Dig. U. S., 554, and cases cited.

The due process clauses of the federal Constitution, while designed to preserve life, liberty, and property inviolate, as against the encroachments of mere arbitrary power, were not intended to interfere with the power of the State, sometimes termed the police power, to prescribe regulations for the protection and promotion of the health, peace, morals, education, good order, and general welfare of the people. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions neither the Fifth nor Fourteenth Amendment was designed to interfere. The liberty of contract and the right of property are not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. These rights, like all others,

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must be exercised in subordination to law. The liberty of contract cannot be exercised contrary to established public policy, and the public policy of the State must be deemed to be authoritatively declared by its own courts, and as so declared it cannot be contravened by the contracts of parties. The State has the undoubted right to impose restraints demanded by the public interest, or by the safety and welfare of the State. 5 Enc. Dig. U. S., 557, 558, and cases cited.

Applying the principles of these authorities to the agreed facts in the present case, we think it results that the contract between the parties, although for a contingent fee, was a legal and valid contract, not against any established public policy, or contrary to any law or statute of the government, and that complainants, having already performed the contract on their part and become entitled to the compensation agreed on upon the payment of the claim by the government, had a vested property right in the same, which could not be destroyed by an arbitrary act of Congress, and therefore that section 4 of said act of March 4, 1915, in so far as it undertakes to deprive complainants of the benefits of their contract, is void under the Fifth Amendment of the Constitution.

It must be remembered that the services of complainants had already been performed, and that their interest and rights under the contract had already become vested, subject to be defeated, it is true, by

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the failure of Congress to make the necessary appropriation to pay the claim in question. It should be noted, also, that this act (section 4) is not a general law of the land, but applies only to the particular claims therein provided for.

It will be noted, also, that no question is made, in this case, by the defendant, as to the reasonableness or validity of the contract; but the refusal to pay the full amount contracted for is based alone upon section 4 of the appropriation act. While the courts do not always favor contingent fees, and are inclined to look with some suspicion upon such contracts especially where the amount agreed to be paid is so large a proportion of the claim as in the present case, still the decided trend of judicial decision and of legislation has been in favor of upholding and enforcing such contracts, where no question of fraud, or misrepresentation, or unfair dealing is set up against them by the opposite party.

We do not agree with learned counsel for defendant that the claim appropriated for and paid to the city, in this case, was a bounty or a gift; it was in the nature of a debt, and was supported by a good and valuable consideration. It is true that its payment could not be enforced by legal process, and was dependent upon the voluntary action of Congress. But the findings of the court of claims, which is attached to the agreement of facts as Exhibit 3, shows that the claim was based upon "the reasonable rental value of the premises" in question from January 1,

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1863, to April 1, 1866, which were taken and occupied by the military authorities of the federal government during the Civil War.

It follows, therefore, that complainants, notwithstanding section 4 of the act of Congress of March 4, 1915, are entitled, as against the city of Memphis, to recover the balance of their compensation as agreed on; and the decree of the chancellor will be affirmed, but provided that no interest will be allowed on the claim, and that the costs of the case, in both courts, will be paid by complainants.

Judge W. H. SWIGGART, SR., of Union City, sat as Special Justice during the April term, 1916, for West Tennessee, in lieu of Chief Justice NEIL, who was presiding over the State senate, sitting as a court of impeachment, at Nashville, during the whole of that term.

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J. A. DEMING, Chief of Police *et al.* v. JOE NICHOLS.

(*Jackson.* April Term, 1916.)

BAIL. Pending appeal. Violation of ordinance.

Defendant convicted in a city court of carrying concealed weapons in violation of city ordinance, being unable to furnish an appeal bond, might take the paupers' oath and have his case reviewed by the circuit court, but was not entitled to a discharge from custody pending the appeal, unless he gave a bail bond in a sufficient amount to appear and perform whatever judgment might be rendered by the appellate court.

Acts cited and construed: Acts 1909, ch. 407.

Cases cited and approved: *State v. Taxing Dist. of Shelby Co.*, 84 Tenn., 251; *State v. Mason*, 71 Tenn., 649; *Greenwood v. State*, 65 Tenn., 567; *State v. Haynes*, 104 Tenn., 406; *Mayor of Nashville v. Fisher*, 1 Shan. Cas., 345.

Cases cited and distinguished: *O'Haver v. Montgomery*, 120 Tenn., 448; *Memphis v. Schade*, 59 Tenn., 579.

Code cited and construed: Sec. 5907 (S.).

Constitution cited and construed: Art. 6, sec. 1.

FROM MADISON

Appeal from the Circuit Court of Madison County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
S. J. EVERETT, Judge.

Deming v. Nichols.

W. N. KEY, for plaintiff.

T. W. POPE, for defendants.

MR. A. R. GHOLSON, Special Judge, delivered the opinion of the Court.

The defendant Joe Nichols was arraigned before the city judge of the municipality of Jackson on a charge of carrying concealed weapons. He was convicted, fined \$50, and committed to prison in default of payment. He seasonably prayed and was granted an appeal to the circuit court of Madison county on condition that he furnish an appeal bond in the penalty of \$100. After exhausting every effort to make the bond he tendered an oath in lieu thereof, as provided for poor persons, but the city judge denied his right to prosecute his appeal upon the oath, though not questioning the sufficiency, form or substance of the oath. Nichols then presented to Honorable S. J. Everett, circuit judge, his petition for a writ of *habeas corpus*, setting out the facts just stated, and also stating that he was not guilty of the charge preferred against him in the city court for which the fine was imposed. The writ of *habeas corpus* was duly issued, and on the hearing before Judge Everett it was held that defendant was improperly detained and should be discharged, and the oath taken in lieu of the bond. J. A. Deming, chief of police, and the city of Jackson, excepted and appealed to the court of civil appeals. That court sustained the action of the circuit judge

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and a *certiorari* has been filed asking that this court review the action of the court of civil appeals.

Under section 1 of article 6 of the Constitution of Tennessee, the judicial power of this State is vested in certain courts, and the legislature was authorized to vest such jurisdiction in corporate courts as might be deemed necessary. In pursuance of the said constitutional provision the legislature of this state, by section 5907 of Shannon's Code, provided that the judicial power of the State should be vested in justices of the peace, recorders of certain towns and cities, county courts, criminal courts, common law and chancery courts, and the supreme court.

The present municipal corporation of the city of Jackson was created by chapter 407 of the Acts of 1909. Section 14 of said act provided that the mayor and board of aldermen, known as the legislative council, of said city, should have full power and authority:

Subsec. 5. "To provide for the prevention and punishment of offenses against the person, public and private property, public morality and decency, the public health, public peace, public justice, and public policy committed within said city, and to define such offenses."

Subsec. 25. "To regulate the police of the city; to impose fines, forfeitures, and penalties, and provide for the terms of imprisonment for the breach of any ordinance, and to provide for their recovery and appropriation."

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Subsec. 27. "To prevent and punish by pecuniary penalties or imprisonment all breaches of the peace, noise, disturbances, or disorderly assemblies in any place in the city."

Subsec. 31. "To provide by ordinance for the taxation and collection of reasonable costs incident to the trial of cases in the city court before the mayor or recorder."

Section 18 of said act is as follows:

"Be it further enacted, that said mayor and aldermen of the city of Jackson shall have power by the passage of necessary laws or ordinances to establish a workhouse under proper provisions, government, and restrictions for the punishment of offenders against the laws and ordinances of said city, and to compel persons who are convicted and fined for violation of the laws and ordinances of the city, and who fail or refuse to pay the fine and cost, to work out the same upon the public streets or works of said city at the rate of one dollar (\$1) per day, to be credited upon said fines and costs and in such way as may be prescribed."

The ordinance under which the defendant was tried, convicted, and held, does not appear in the record, but as no point was made thereon we will assume that the same was duly passed and in force as authorized by the charter provisions quoted above. The question then arises: Did the defendant have the right to prosecute his appeal from such fine on the pauper's oath?

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“In this country there are two modes recognized for enforcing penal ordinances. One is an action of debt to recover the penalty, and the other is the ancient and familiar summary proceeding on information of complaint. At common law the action was, in form, either debt or assumpsit. It was merely to recover the penalty imposed for the violation of the ordinance. In the action of assumpsit, the theory was that there had been a breach of duty, and by fiction of law it was assumed that the defendant had promised the municipal corporation, which in most cases became the plaintiff, to perform the duty. The action of debt was allowable, as the penalty was for a sum certain and in the nature of what might be termed liquidated damages.” McQuillin Municipal Corporations, section 1033, citing 2 Dillon Municipal Corporations (5th Ed.), section 635, and Tiedeman, Mun. Corp., section 156.

“Sometimes the action is regarded as criminal, especially where the offense constitutes a misdemeanor under the laws of the State. Such proceeding is civil in form and *quasi* criminal in character. It is governed by the rules of pleading applicable to civil actions, but if it were solely civil, no fine or imprisonment could be inflicted. It is therefore a *quasi* civil and criminal action. Partaking of some of the features of each, its similitude to either is not complete. In pleading it is more like a civil action, but in its effect and consequences it more nearly resembles a criminal

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proceeding." McQuillin, Municipal Corp., section 1034.

A prosecution for a violation of an ordinance is partly criminal and partly civil in nature. *O'Haver v. Montgomery*, 120 Tenn., 448, 111 S. W., 449, 127 Am. St. Rep., 1014.

"Proceedings instituted by the proper officers of a municipality to recover penalties for a violation of such ordinances are not State prosecutions, nor is a judgment therein a bar to a prosecution for an offense against the laws of the State committed by the same act." *State, etc., v. Taxing Dist. of Shelby County*, 16 Lea, 251; *State v. Mason*, 3 Lea, 649; *Greenwood v. State*, 6 Baxt., 567, 32 Am. Rep., 539.

On appeal from the city court to the State court the trial is *de novo* and in the same manner as trials on appeal from a justice's court to the circuit or district court. The circuit court is to try the case with the same discretion as the recorder himself did and may in its discretion reduce the fine. McQuillin on Municipal Corporations, section 1094; *Memphis v. Schade*, 12 Heisk., 579.

"Since an ordinance without a penalty would be nugatory, the general doctrine uniformly prevails, that, a municipal corporation which has power to pass the ordinance has, as a necessary incident thereto, implied power to provide for its enforcement by appropriate and reasonable fines against those who break it. . . . The general rule applying to municipal corporations is that charter power to restrain

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and prohibit a specific thing implies power to punish its commission." McQuillin, *Municipal Corporations*, section 710.

Mr. Chief Justice Neil, in an able opinion, citing many authorities, in the case of *O'Haver v. Montgomery*, 120 Tenn., 448, 111 S. W., 449, 127 Am. St. Rep., 1014, among other things, said:

"In truth, when a violator of a municipal ordinance is arrested and brought before the municipal court, he is tried for an offense committed against the laws of the corporation; but, in the absence of apt legislation to the contrary, his punishment is in the form of the assessment of a penalty. The practice partakes of both a civil and criminal character. He is arrested on warrant as in criminal cases, and if found guilty a judgment is entered against him as for a fine, and on failure to pay the amount assessed against him he may be held in custody until he pays or secures it, or be put at labor to pay it. If dissatisfied with the judgment he may appeal, as in civil cases, upon complying with the law or statute applicable, and may have a retrial in the circuit court, where the matter will be heard *de novo*, the rules of practice applicable to civil cases applying in such trial; but at last the purpose of the action is punishment. So it is perceived the action is partly criminal and partly civil; a criminal action in substance and purpose, and partly civil and partly criminal in the practice governing it. When we characterize the action as being of a criminal nature, we do not mean to be un-

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derstood as using the term wholly in the sense in which it is applicable to actions brought by the State in the form of indictments and presentments for violations of the criminal laws of the State, but rather by analogy, and for want of a better term. *State v. Haynes*, 104 Tenn., 406, 409, 58 S. W., 120. A municipality is a government within itself, and must have the power to punish for offenses against its laws, and must be able to bring that punishment to bear and to make it effective by its own agencies, that is, through its own courts and officers. However, the right of appeal may be given, and generally is given, and, if exercised, the municipality appears in another jurisdiction; that is, in the courts of the State, as a suitor to recover the penalty which it has assessed against the violator of its laws. But the larger court, while trying the controversy as a civil suit, will see to it that the municipality, if successful, shall have there the same sanctions for the enforcement of its laws as if the trial had terminated in the municipal court. In truth, the action is in its various aspects a hybrid one, partly criminal and partly civil."

Further on in said opinion the same learned judge said:

"An ordinance without a penalty for its violation is a dead letter. A penalty that cannot be enforced is but a vain threat, evoking the derision of mankind. The method of enforcement is unmistakably pointed out by the legislature; that is, failure to pay the penalty shall be followed by imprisonment until secu-

rity is furnished, or the payment made in money or labor. A law with such sanctions has dignity and force. Without them it is but a *brutum fulmen*."

The city of Jackson under the charter above quoted had the power to provide for the prevention and punishment of the offense for which the defendant had been arrested. It also had the power to compel the defendant when convicted and fined, upon failure to pay the fine, to work out said fine and cost, as provided in its charter. To hold that the defendant, being unable to give security on the required bond for appeal, might take the pauper's oath and thereby secure his discharge, would in effect be to nullify the judgment of the city court against him. The purpose of said proceeding in the city court was punishment, and if he could thus avoid the punishment assessed against him, the entire proceeding would be in vain.

A municipal corporation is a subordinate branch of the domestic government of a State. *Mayor of Nashville v. Fisher*, 1 Shan. Cas., 345. A municipal corporation being such an arm of the State government the courts of the State should see that the purposes for which it was created are carried out, and that all proper decrees and judgments of its courts are enforced as contemplated by the law.

A person charged with violating a State law, or one who has been convicted in an inferior court for the violation of a State law, while authorized to appeal and have his case reviewed by an appellate court, would not be discharged pending such appeal, unless

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he gave a bail bond to appear and answer the judgment of the appellate court. A proper construction of our laws authorizing appeals should be such as to carry into effect the judgments and decrees of the appellate courts when rendered. If this defendant were permitted to be discharged after having been fined and convicted in the city court upon the pauper's oath, what assurance would there be that he would be present for the decree of the appellate court to be carried into effect?

To allow those who have been tried and convicted in municipal courts to be discharged upon taking the pauper's oath would in effect declare nugatory all proceedings in such courts against offenders out of whom no judgment could be collected in a civil proceeding. A sound public policy forbids that such be declared the effect of our laws controlling appeals in such cases.

We therefore hold that while the defendant might have taken the oath required for poor persons and had his case reviewed by the circuit court, yet that he should have been held by the municipal authorities pending such appeal, unless he gave a bail bond in a sufficient amount to appear and perform whatever judgment might be rendered by the appellate court.

It follows, therefore, that the court of civil appeals and the circuit judge were in error in ordering the defendant discharged.

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CHICKASAW HOTEL Co. v. C. B. BARKER CONSTRUCTION
Co. *et al.**

(*Jackson*. April Term, 1916.)

1. MECHANICS' LIENS. Purpose of statute. Construction.

The intention of the legislature in enacting the mechanic's lien laws was to secure and protect the laborer in his wages, and thereby to promote and encourage improvements, and the act should be given a liberal construction so as to carry out such purpose. (*Post*, pp. 314, 315.)

Cases cited and approved: *Alley v. Lamier*, 41 Tenn., 540; *Truxall v. Williams*, 83 Tenn., 428; *Barnes v. Thompson*, 32 Tenn., 313; *Steger v. Arctic, etc., Co.*, 89 Tenn., 453; *Luttrell v. Railroad*, 119 Tenn., 508.

2. MECHANICS' LIENS. Procedure. Construction.

While the law is strict in its requirements that the claimant shall make it clearly appear that he has a lien, yet when that appears remedial laws for its enforcement are to be liberally construed. (*Post*, p. 315.)

Case cited and approved: *Thompson v. Baxter*, 92 Tenn., 305.

3. BANKRUPTCY. Mechanics' liens. Discharge in bankruptcy. Statute.

Under Bankrupt Act, July 1, 1898, chapter 541, section 67, cl. D, 30 Stat. 564 (U. S. Comp. St. 1913, section 9651), providing that liens given or accepted in good faith and for a personal consideration, which have been recorded according to law, if the record thereof is necessary to impart notice, shall not be affected by the act, and section 16 (section 9600), providing that the liability of a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the bankrupt's discharge, there was no intention to impair liens valid under the State laws, but to give the bankrupt personal

*On the effect of bankruptcy of principal contractor upon lien rights of subcontractors or materialmen, see note in 51 L. R. A. (N. S.), 68, and as to the effect of bankruptcy of contractor on right of laborer or materialman to enforce mechanic's lien against property improved, see note in 26 L. R. A. (N. S.), 409.

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immunity from his debts, leaving intact all liens existing prior to the bankruptcy in favor of his creditors, so that mechanics' liens upon the property of a hotel company in force more than four months prior to the contractor's adjudication in bankruptcy continued in force as against the property of the hotel company, after the contractor's discharge. (*Post*, pp. 315-321.)

Cases cited and approved: Pike Bros. Lbr. Co. v. Mitchell, 131 Ga., 675; In re Huston, 7 Am. Bankr. Rep., 92; Crane Co. v. Signal Co., 42 Misc. Rep., 338; In re Grissler, 136 Fed., 754.

Cases cited and distinguished: Holland v. Cunliff, 96 Mo. App. 67; Eberle v. Drennan, 40 Okla., 59.

4. BANKRUPTCY. Discharge of contractor. Parties. Judgment against owner.

The owner filed a bill in chancery against the contractor, the guaranty company, and certain sub-contractors and materialmen who had filed liens against the property, and the separate suits of the lien claimants were consolidated therewith, and the owner sought judgment against the contractor and the surety company for the amount of liens established against its property, and a stipulation between the hotel company, the construction company by its trustee in bankruptcy, and the surety company was filed, showing the amount due from the hotel company to the construction company, providing that it should be applied to the discharge of liens for which the hotel company was secondarily liable, without releasing the surety, and the construction company thereafter filed a petition to stay, and later alleged its discharge in bankruptcy as a bar to the lien claims. *Held*, that, as all the parties were before the court, the fact that judgment could not be had against the contractor by reason of his adjudication in bankruptcy did not prevent a foreclosure of the liens against the hotel property, and that, as the trustee in bankruptcy came into court, it was not necessary that the lienholders should be compelled follow the trustee and the bankrupt back into the bankruptcy court to adjust their claims. (*Post*, pp. 321-327.)

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Cases cited and approved: Warner v. Yates, 118 Tenn., 548; Luttrell v. Railroad, 119 Tenn., 492; Wolf v. Stix, 99 U. S., 1; U. S. Wind, Engine & Pump Co. v. N. Penn. & Iron Co., 227 Pa., 262; Chamberlin v. Huguenot Mfg. Co., 118 Mass., 532; New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S., 656; Munson v. Railroad, 120 Mass., 81; Pike Bros. Lbr. Co. v. Mitchell, 132 Ga., 675.

Cases cited and distinguished: Hill v. Harding, 130 U. S., 699; Butterick Pub. Co. v. Bowen, 33 R. I., 43; Powers Dry Goods Co. v. Nelson, 10 N. D., 580.

5. **BANKRUPTCY. Proof of claim. Action.**

In the case of a bankrupt corporation, the bankruptcy act does not restrain a creditor who has not proved his claim in bankruptcy from prosecuting an action to judgment to enforce his lien upon the property attached or to charge officers or stockholders liable for the debts of the corporation. (*Post*, pp. 521, 527.)

FROM SHELBY

Error to Chancery Court of Shelby County.—FRANCIS FENTRESS, Chancellor.

WILSON & ARMSTRONG, for plaintiff in error.

H. H. BAKER, McGEHEE, LIVINGSTON & FARRABAUGH and J. W. CANADA, for defendant in error.

MR. A. R. GHOLSON, Special Judge, delivered the opinion of the Court.

The facts so far as material to this inquiry are undisputed and are as follows:

On October 11, 1912, the Chickasaw Hotel Company a corporation, entered into a contract with the C. B.

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Barker Construction Company, also a corporation, by which said construction company agreed to erect on a certain lot in Memphis belonging to the hotel company a building known as the Chisca Hotel. The Barker Construction Company, as principal contractor, gave an indemnity bond with the United States Fidelity & Guaranty Company as surety to protect the hotel company against liens. The construction company did not pay all the subcontractors and materialmen for work done and materials furnished for said hotel building, and some nineteen of these parties filed suits in the chancery court at Memphis, claiming liens upon the hotel property. Thereupon the hotel company filed a bill in said chancery court against the C. B. Barker Construction Company, the United States Fidelity & Guaranty Company, the trustees in certain deeds of trust, and said subcontractors and materialmen.

The said bill, among other things, stated that the several lien claimants had served notices and had filed bills thereon to collect from it their respective claims. It alleged that the said construction company and the said Fidelity & Guaranty Company denied some of said claims, or some parts thereof, and denied that some of them were liens on the property of the complainant. In said bill the following allegation is made by the hotel company:

“If said claims are valid and binding liens upon its property, the complainant wishes them paid, and complainant also desires that said Barker Construction

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Company comply with said contract to pay same, and that said United States Fidelity & Guaranty Company should comply with its contract and bond and should indemnify and save it harmless against payment of same. This complainant, however, cannot safely pay or discharge same, even if it had the money in its hands for that purpose, with any denial of liability, or correctness or justness of such claims, either by the Barker Construction Company or the United States Fidelity & Guaranty Company."

The prayer of the bill asked that all separate suits of the lien claimants be enjoined, and that they be required to establish their respective claims in the suit brought by the hotel company; that all pending bills be treated as cross-bills in said cause, and the various causes consolidated thereunder; that if any of the lien claimants had valid and subsisting liens against its property, said construction company and said guaranty company be required to discharge same in accordance with their contracts and with the bond of said guaranty company, and that complainant be granted a decree against both of said parties for the amount of such claims as are established as liens against its property, etc.

On September 11, 1914, the causes were consolidated under the bill of said Chickasaw Hotel Company, and an order entered that the proof taken in each case be read as to all the causes so far as applicable.

It was agreed by counsel, in order to save costs, that the case of the York Lumber & Manufacturing Com-

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pany, was the one that should be brought to this court by appeal, the record in that case being similar to the records in all the other causes.

The bill of the York Lumber & Manufacturing Company was filed April 7, 1914. The answer of the construction company was filed September 22, 1914. The answer of the Chickasaw Hotel Company was filed October 24, 1914, both of these answers being to the bill of the York Lumber & Manufacturing Company. The deposition of P. A. Gates, proving the claim of the York Lumber & Manufacturing Company, was filed February 9, 1915. No proof was taken to controvert it.

On October 5, 1915, there was filed in the consolidated causes a stipulation of settlement of account between the hotel company and the construction company, which agreement was made between and among three parties: The hotel company, the C. B. Barker Construction Company, by R. E. Montgomery, Vice President, also by R. E. Montgomery its trustee in bankruptcy, and the United States Fidelity & Guaranty Company. This agreement showed that the trustee in bankruptcy in making said agreement was acting by and with the authority of the bankrupt court administering the estate of said construction company. The purport of said agreement was that the clerk and master's report in said cause, filed on the 20th of September, 1915, finding a net balance owing to the construction company by the hotel company of \$22,853.38, should be modified so as to show that said hotel com-

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pany owed said construction company the sum of \$19,000 as of October 1, 1915, which was to be in full and final settlement between the parties of all claims and counterclaims due for the construction of the Chisca Hotel, and when paid by the said hotel company was to be a full discharge therefor. Judgment was to be entered against the hotel company for said sum, to bear interest from October 1, 1915, until paid. It was stipulated that while said judgment might be in favor of said construction company, the said \$19,000 was to be held and applied first to the liquidation and discharge of all legally valid claims for material, labor, and subcontractors which had been or might be established as liens against the property of the hotel company, or for which the Chickasaw Hotel Company was secondarily liable by reason of the lien claims chargeable to the construction company; that said agreement was in no way to release the Fidelity & Guaranty Company from its liability under its said bond to indemnify and hold harmless said hotel company against any liens or balance on any lien claims, material claims or labor claims, or subcontractors' claims, left unpaid after the application of the said \$19,000.

Upon this agreement a decree was by consent on the same day duly entered in said consolidated causes, embodying said stipulation, and in conformity thereto.

On November 4, 1915, the C. B. Barker Construction Company filed a petition for stay and leave to plead its bankruptcy, alleging that on the 21st of September, 1915, it filed its voluntary petition in bankruptcy, and

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was duly adjudged on the same day a bankrupt in the district court of the United States for the Western District of Tennessee; that on the 28th of October, 1915, it had applied for a discharge in bankruptcy. It insisted that all claims against it sued on in said consolidated causes were properly provable in said bankruptcy proceeding, and that a discharge of it therein would release it from all of said claims, and it asked the court to stay all further proceedings in said consolidated causes until its application for the discharge be heard. This petition for stay was denied by the chancellor.

On November 19, 1915, exceptions were filed in said consolidated causes by said construction company, and also by the hotel company, to all testimony offered by complainants in each and every one of the consolidated causes tending to establish complainants' accounts, or any indebtedness or claims against said construction company, upon the ground that said construction company had been duly adjudged a bankrupt by a court of competent jurisdiction, in which the estate of said bankrupt was being administered, and in which the claims sued upon by complainants were properly provable, and that the chancery court was without jurisdiction to further proceed, etc.

On January 21, 1916, leave having been obtained, the supplemental answer of said construction company and said hotel company was filed, pleading the adjudication and discharge of said construction company as a bankrupt (which discharge was granted on

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the 15th day of January, 1916), as a bar to the claims of all the lien claimants, and contending that all of their liens upon the property of said respondents, or either of them, had been released and discharged.

On March 17, 1916, a final decree was entered by the chancellor, in said consolidated causes, adjudging the rights of all the parties. The said construction company was adjudged to be indebted to the various lien claimants, eleven in all, in the respective amounts claimed, with interest thereon from February 6, 1914, and they were adjudged to have mechanic's or furnisher's liens upon said lot and property belonging to the hotel company. That the plea of said construction company and said hotel company of the discharge in bankruptcy in these causes as a bar to the liens of the said lien complainants did not defeat said liens or prevent said claimants from enforcing them upon the property of the hotel company. That the hotel company was entitled to a decree against the said guaranty company for the difference left of complainants' lien debts after applying the \$19,000 of indebtedness due by the hotel company to the construction company. That said sum of \$19,000 would be first applied on said liens and the costs. The said hotel company was ordered to pay the remainder of said lien debts and costs, and if not paid within sixty days, the property of the hotel company would be sold and the proceeds applied thereon.

Judgments were rendered in favor of the eleven lienholders for the amount of their respective debts,

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interest, and costs, against said construction company, but no executions were to issue because of its discharge in bankruptcy, and the issuance of such executions was perpetually enjoined.

The hotel company has appealed, and the construction company has brought the case up by writ of error. Both have assigned errors, the substance of which is that a valid judgment against the principal contractor, adjudicating the amount of the subcontractor's claim, is a necessary prerequisite to the enforcement of a mechanic's lien; that the property owner is entitled to said adjudication, and the burden is upon the subcontractor to furnish it; that the discharge in bankruptcy of the principal contractor prevented a judgment against it, and as a consequence prevents the enforcement of the lien; that the bankrupt court alone had jurisdiction to adjudicate any and all claims against the bankrupt; that the lien claimants herein, having failed to secure an adjudication of their claims in the bankrupt court, have no valid judgments as a basis for the enforcement of their liens.

The manifest intention of the legislature in enacting the mechanic's lien laws was to secure and protect the laborer in his wages, and thereby to promote and encourage improvements. *Alley v. Lamier*, 1 Cold., 540; *Truxall v. Williams*, 15 Lea, 428.

The object of the legislature was to secure to an industrious, meritorious class of the community the benefit of their labor, and the act should be so construed as to carry out this laudable purpose. *Barnes*

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v. *Thompson*, 2 Swan, 313; *Steger v. Arctic, etc., Co.*, 89 Tenn., 453, 14 S. W., 1087, 11 L. R. A., 580.

The uniform policy has been to give the mechanic's lien law a liberal construction to carry out its purpose, and to secure and protect those entitled to the lien, and thereby to promote and encourage improvements. *Luttrell v. Railroad*, 119 Tenn., 508, 105 S. W., 565, 123 Am. St. Rep., 737, and authorities cited.

The law is strict in its requirements that the claimant shall make it to clearly appear that he has a lien; but when that appears, remedial laws for its enforcement are to be liberally construed. *Thompson v. Baxter*, 92 Tenn., 305, 21 S. W., 668, 36 Am. St. Rep., 85.

There can be no serious doubt that the York Lumber & Manufacturing Company, and others so adjudged by the chancellor to have had liens, did have liens upon the property of the hotel company prior to the adjudication and discharge in bankruptcy of the construction company. It is also true that these liens had been in force for more than four months before such adjudication of the principal contractor. It is also true that until such adjudication of bankruptcy all parties then necessary were before the chancery court.

Now the question for consideration is, What was the effect of such adjudication and discharge upon said liens?

Clause D, section 67, of the last Bankrupt Act, is as follows:

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“Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall . . . not be affected by this act.”

Section 16 of the act is as follows:

“The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such bankrupt.”

We quote from volume 3 of Remington on Bankruptcy, the following sections:

“Sec. 2668. Discharge Bars Debts, Not Enforcement of Liens or Title to Property.—In actions to try the title to property, or to determine the validity of liens on property, or interest therein, where no recovery of a debt is sought, the defendant may not interpose his discharge in bankruptcy—discharge bars debts, not ownership of property, whether such ownership of the whole or merely partial ownership.”

“Sec. 2672. Debt Not Extinguished but its Enforcement Barred.—Discharge is not a payment nor extinguishment of debts; it is simply a bar to their enforcement by legal proceedings.

“Sec. 2673. Valid Liens Not Cast Off nor Their Enforcement Prevented.—The discharge does not operate to cast off good and valid liens given or acquired for the debts, either liens by contract or by legal pro-

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ceedings, nor to prevent their enforcement. It is purely personal to the bankrupt."

"Sec. 2712. And Where Judgment Necessary to Perfect Rights against Surety, or Property.—Likewise, where a creditor's rights against a surety are dependent upon his getting judgment against the bankrupt principal, it would seem a proper exercise of discretion to permit proceedings to be instituted, or pending proceedings to be prosecuted to judgment, for the purpose of fixing the surety's liability."

We believe that Congress in the passage of the bankrupt act had due regard for all vested rights, valid liens, and securities, and that there was no intention on its part to destroy or impair the obligation of contracts, fixing liens or securities valid under the State laws. The language of the act is very broad, and evidences the purpose of Congress to protect all liens and securities of every kind; and, while the liens referred to have reference, no doubt, to liens upon the property of the bankrupt, yet the second clause quoted above is quite broad enough to cover the lien in this case against the property of the hotel company.

The intention of Congress to preserve liens and securities of the creditors of the bankrupt, which liens and securities are not given in fraud of the act itself, is clearly shown by clause D of section 67, *supra*. The purpose of the act, as we believe, was to give the bankrupt personal immunity from his debts, but to leave intact all securities, liens, and valid attachments

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which existed prior to the bankruptcy in favor of creditors of the bankrupt.

The case of *Holland v. Cunliff*, was a mechanic's lien case, decided in the court of appeals of Missouri, August 6, 1902, and reported in 96 Mo. App., 67, 69 S. W., 737. The facts of that case are that Holland, the plaintiff, contracted to do certain work for the defendants Cunliff, in constructing improvements upon property belonging to them. After he had begun his work, part of the property was sold to defendant Mrs. Langan, and he continued with his work and completed it. He then filed suit to enforce his lien on the property. Subsequent to filing the suit, the Cunliffs filed their petition in bankruptcy, and were granted a discharge, which discharge was pleaded as a bar to plaintiff's lien, as is done in this suit. The court held that the discharge of the Cunliffs, the principal debtors, did not defeat the plaintiff's lien upon the property. In that case the court said:

"It appears to us that the true construction of the bankrupt act itself must be held to preserve the force of a lien such as here appears to have been perfected, by every proper step except a final judgment, more than four months before the bankruptcy proceedings began. Another feature of the . . . bankrupt law indicates how strictly personal the discharge thereunder is intended to be. We refer to the provision which declares that 'the liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt, shall not be altered by the discharge

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of such bankrupt.' Section 16. The words 'in any manner a surety for bankrupt' are of wide scope. Their intent appears to be to make the discharge personal to the debtor, and to eliminate the general effect which would follow the release of the debt by the act of the parties, under the principles of common law. . . . The drift of all these rulings is to sustain the judgment here, in the circumstances confronting the court. The original debtors were made parties to this action. No personal judgment was entered against them because of their discharge from personal liability by force of the bankrupt act, but the lien affixed by their actions upon the property was not divested by their discharge, which had no larger effect than to release their personal liability.

"The principle on which this result must rest is that a discharge in bankruptcy does not extinguish the debt, but merely confers a personal immunity from the enforcement thereof. Hence any valid lien, already imposed on property to secure the debt, at the time when the bankruptcy proceeding became effective, continues in undiminished vigor, unless the bankrupt law itself or our own positive law abates it. The lien in question here is not of that class. The Missouri statutes fully sustain it, and the federal law does not impair it."

In the case of *Eberle v. Drennan*, decided December 3, 1912, by the supreme court of Oklahoma, 40 Okl., 59, 136 Pac., 162, 51 L. R. A. (N. S.), 68, among other things the court said: .

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“It is insisted by plaintiffs in error: First, that by and on account of the bankruptcy of the original contractor, the claims for liens against the property of these plaintiffs in error on the part of the subcontractors and materialmen were wiped out; that there is but one debt, which is the debt of the contractor, and when this is settled, either by payment or bankruptcy, the foundation for the lien fails, and to support this claim cite the case of *Pike Bros. Lbr. Co. v. Mitchell*, 132 Ga., 675, 64 S. E., 998, 26 L. R. A. (N. S.), 409; and some other cases from that jurisdiction. Counsel for the lien claimants, as against this contention, cite, among others, the following authorities: *Re Huston*, 7 Am. Bankr. Rep., 92; *Crane Co. v. Pneumatic Signal Co.*, 42 Misc. Rep., 338, 86 N. Y. Supp., 711, Id., 94 App. Div., 53, 87 N. Y. Supp., 917, 11 Am. Bankr. Rep., 747; *Re Grissler*, 136 Fed., 754, 69 C. C. A., 406, 13 Am. Bankr. Rep., 508—to support the proposition that an adjudication of bankruptcy of the original contractor does not cut off the right of a subcontractor or materialman to file and enforce his lien against the owner’s land; and, in our judgment, it was not the intention of the legislature in its passage of the Mechanic’s Lien Act to provide that the insolvency or bankruptcy of the principal contractor should defeat the claims mentioned. . . . It is true section 6156, Compiled Laws of 1909, provides that the original contractor shall be made a party defendant in all such actions, and it is further true that where he has become a bankrupt, he cannot be sued and the

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liability enforced personally against him, but the very purpose of the act is to subject the property of the owner to the payment of the debts incurred by the original contractor when he does not pay them himself, and it would be a strange anomaly if, when that very condition arises and the original contractor availed himself of the bankruptcy statute, the law which was made to protect such of his creditors would then, when needed most, wholly fail. When the owner begins to construct his building, engages his contractor, and the contractor purchases material or employs laborers, they all act with this statute in view, and with the knowledge on the part of all that the liability of the original contractor to materialmen and laborers within the scope of his contract may, on his failure to meet it, be enforced against the property."

It is earnestly insisted in argument, and in the able brief for appellants, that judgments for the claims could not be had against the contractor because of its adjudication in bankruptcy, and therefore the materialmen and subcontractors cannot foreclose their liens against the property improved. It is insisted that the rule announced by this court in the cases of *Warner v. Yates*, 118 Tenn., 548, 102 S. W., 92, and *Luttrell v. Railroad*, 119 Tenn., 492, 105 S. W., 565, 123 Am. St. Rep. 737, is that, in a suit by a subcontractor to enforce a mechanic's lien, the principal contractor is a necessary party, because the action cannot be maintained without establishing both the debt and

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the lien, and that the owner is entitled to be furnished with an adjudicated claim, not an open account. It is further insisted that, because of the adjudication in bankruptcy of the principal contractor, not even a qualified judgment can be given against him so as to enable the lien claimant to proceed to enforce his lien.

The leading case in the United States upon this question is *Hill v. Harding*, 130 U. S., 699, 9 Sup. Ct., 725, 32 L. Ed., 1083, wherein it was said:

“The question not then passed upon, and now presented, is whether, since he (the defendant) has obtained his discharge in bankruptcy, there is anything in the provisions of the bankrupt act to prevent the State court from rendering judgment on the verdict against him, with a perpetual stay of execution, so as to prevent the plaintiffs from enforcing the judgment against him, and leave them at liberty to proceed against the sureties in the bond or recognizance given to dissolve an attachment made more than four months before the commencement of the proceedings in bankruptcy. Such attachments being recognized as valid by the bankrupt act (Rev. Stat., 5044) a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. . . . The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties, in accordance with the express terms of their contract, and with the spirit of that

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provision of the bankrupt act which declares that 'no discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.' "

The clause in the present bankrupt act of 1898, quoted *supra*, in this opinion, is broader in its terms with reference to the liability of sureties upon the discharge of a bankrupt than the one referred to in the opinion of *Hill v. Harding*. See, also, *Wolf v. Stix*, 99 U. S., 1, 25 L. Ed., 309.

Hill v. Harding, *supra*, although construing a former bankruptcy act, is quoted approvingly by the supreme court of Rhode Island in a decision rendered July 7, 1911, construing the present bankruptcy act, in the case of *Butterick Publishing Company v. Bowen*, 33 R. I., 43, 80 Atl., 278, where, among other things, it was said:

"We are of the opinion, however, that the better position is one which preserves to the bankrupt the full benefit of his discharge, and at the same time does not deprive the creditor of the advantage which the bankruptcy law permits him to have by reason of his attachment made more than four months before the commencement of bankruptcy proceedings. This position, more in accord with reason and justice, as it seems to us, is supported by the weight of authority."

In the case of *U. S. Wind, Engine & Pump Co. v. N. Penn. & Iron Co.*, the supreme court of Pennsylvania, in a decision rendered February 21, 1910, 227

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Pa., 262, 75 Atl., 1094, approved and followed *Hill v. Harding*, supra.

In the case of a bankrupt corporation, the bankruptcy act does not restrain a creditor, who has not proved his claim in bankruptcy, from prosecuting an action to judgment, for the purpose of enforcing his lien upon the property attached, or of charging officers or stockholders who are liable for the debts of the corporation. *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass., 532; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S., 656, 23 L. Ed., 336; *Munson v. Boston, Hartford & Erie R. R. Co.*, 120 Mass., 81, 21 Am. Rep., 499.

In the case of *Powers Dry Goods Co. v. Nelson*, 10 N. D., 580, 88 N. W., 703, 58 L. R. A., 770, decided in November, 1901, among other things it was held that:

“The lien of an attachment on personal property of a bankrupt is not destroyed by a mere discharge . . . under the present national bankruptcy act; and unless such lien is one which is itself declared void by said act, it may be enforced, through a modified form of judgment, as against the property on which the lien exists.”

We might cite many more cases, but do not deem it necessary.

Learned counsel for appellants have cited and relied upon the case of *Pike Bros. Lbr. Co. v. Mitchell*, 132 Ga., 675, 64 S. E., 998, 26 L. R. A. (N. S.), 409, and certain other cases which seem to have either followed or been founded upon the rule therein an-

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nounced. We do not believe that the weight of authority sustains these cases. Neither do we think the rule therein stated to be founded upon reason or justice.

The rule laid down in *Pike Bros. Lumber Co. v. Mitchell*, supra, and other cases, was referred to in the case of *Eberle v. Drennan*, supra, but the supreme court of Oklahoma declined to follow the Georgia cases. See the many other authorities cited under the latter case sustaining the true rule.

We believe that the necessary requirements as announced by this court in *Warner v. Yates and Luttrell v. Railroad Co.*, supra, have been fully met by the lien claimants in these suits. They filed their bills after giving notice against the principal contractor and the landowner, and were proceeding to judgment when the principal contractor was adjudged a bankrupt. The matters of account had been referred to the clerk and master by the chancellor, and he had made a report. This report is not in the record, but the record shows that the only exception by the contractor and hotel company to the claim of the York Lumber & Manufacturing Company was as to the question of interest allowed.

It appears that under the proceedings had in this cause the necessary parties were before a court of equity for a settlement of all questions; that the trustee in bankruptcy came into court, by authority of the bankrupt court, and entered into a stipulated agreement, upon which a consent decree was founded,

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giving judgment against the hotel company in favor of the principal contractor, the bankrupt; that by the terms of this consent decree, the proceeds of said judgment were not to go into the bankrupt court, but were to be distributed among the lienholders. The bankrupt was before the chancery court, and his trustee in bankruptcy came into that court with express authority to have an adjudication, moreover to waive, and he did waive, the right of that court to take jurisdiction of the assets of the bankrupt, to wit, the debt due from the hotel company.

Then why can it be, after all this, that these lienholders should be compelled to follow the trustee and the bankrupt back into the bankrupt court in order to adjust their respective claims? They were not seeking any of the bankrupt's property. The amount due from the hotel company to the bankrupt, by the action of the trustee, was left under the jurisdiction of the chancery court.

Suppose that we should hold these lienholders not entitled to the \$19,000 already adjudged by a consent decree to be due from the hotel company to the Construction Company, what would become of this fund? The trustee in bankruptcy has disclaimed his rights to it. Could it be held that the hotel company was entitled to this judgment against itself, and that, too, after it had come into a court of equity, asking equity, and stating in its bill that if there were any valid claims against it that it wished them paid?

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It is remarkable that the hotel company, after consenting to the rendition of a judgment against it, and the contractor, after it and its trustee in bankruptcy had disclaimed their right to this judgment, should combine and fight as earnestly as they have. Why is it that the guaranty company, upon whom it seems the loss must fall, has made no complaint? The case in its entirety does not appeal to us as one having much equity in favor of the hotel company and the Barker Construction Company.

We hold that the action of the chancellor in rendering qualified judgments in favor of the eleven lien holders, without requiring them to go into the bankruptcy proceeding, was correct, and that he was also correct in decreeing that, unless these claims were paid as required, they would be entitled to have their liens foreclosed by a sale of the property, and his decree is affirmed in all things in so far as the eleven claimants against whom appeals were prayed are concerned. This decree will inure to the benefit of any other creditors who may, by decree of this court on appeal, be given liens in other cases. The costs of the appeal will be paid by the hotel company and of the writ of error by the construction company.

A. L. PRITCHARD v. T. T. REBORI.

(Jackson. April Term, 1916.)

1. BOUNDARIES. Controlling elements.

The general rule that resort is, first, to natural objects or landmarks; second, to artificial monuments; third, to lines of adjacent owners; and last, to courses and distances—is not inflexible or absolute. (*Post*, pp. 332, 333.)

2. DEEDS. Construction. Intention of parties.

Construction of a deed is to discover intention of the parties, and this applies to descriptions as well as to other parts of the instrument. (*Post*, p. 333.)

3. BOUNDARIES. Controlling elements. Monuments.

There is no magic in a monument called for so as to make it control invariably, but it controls only when regarded as more certain than course or distance. (*Post*, p. 333.)

4. BOUNDARIES. Controlling elements. Adjacent boundary.

A mere adjacent boundary line would yield more readily to course and distance than an artificial monument. (*Post*, pp. 333, 334.)

Case cited and distinguished: *Carson v. Burnett*, 18 N. C., 546.

5. BOUNDARIES. Controlling elements.

The rule that course and distance yield to monuments or adjacent boundary lines is usually applied in fuller force to large boundaries of land in the country, and with less potency in towns or cities. (*Post*, p. 334.)

Case cited and distinguished: *White v. Luning*, 93 U. S., 514.

6. BOUNDARIES. Controlling elements.

In deeds to city property, where courses and distances were intended by the parties to control, they will be given that effect. (*Post*, pp. 334, 335.)

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7. DEEDS. Construction. Property conveyed.

The object in all boundary questions is to find as nearly as may be certain evidences of what particular land was meant to be included for conveyance. (*Post*, pp. 334, 335.)

8. DEEDS. Construction. Property conveyed. Presumptions.

The natural presumption is that the deed was made after and with reference to an actual view of the premises by the parties. (*Post*, pp. 334, 335.)

9. BOUNDARIES. Controlling elements.

Where a deed to a city lot recited "thirty feet to a right of way," and there was no actual monument marking the right of way, the call for the right of way would yield to distance; the parcel being so small as to be seen at a glance, and the outer limit lacking definiteness to override the distance call, especially where a fence inside the right of way misled the parties to believe it to be the boundary. (*Post*, pp. 335, 336.)

Cases cited and approved: *Doe v. Riley*, 28 Ala., 164; *Dolphin v. Klann*, 246 Mo., 477.

10. BOUNDARIES. Evidence. Parol evidence. Intent.

A grant of land bounded on a street will be referred to the street as built and used, and not as shown on a recorded map or plat; but if the land is conveyed bounded by a highway, parol evidence is admissible to show whether the actual or the surveyed line was intended. (*Post*, pp. 336, 337.)

Case cited and approved: *Wead v. St. Johnsbury, etc., R. Co.*, 64 Vt., 52.

11. CONVENANTS. "Incumbrance." Railway right of way. Damage.

Where land sold under warranty encroached on a railroad right of way, such right was an encumbrance and the grantee on removing it would recover the amount necessarily paid in so doing, with interest, if fair and reasonable, as damages for the breach of covenant. (*Post*, p. 337.)

Cases cited and approved: *Kenney v. Norton*, 57 Tenn., 384; *Robinson v. Bierce*, 102 Tenn., 428.

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FROM SHELBY

Appeal from the Chancery Court of Shelby County.
—JAS. L. McREE, Special Chancellor.

P. H. PHELAN, JR., for appellant.

WILSON & ARMSTRONG, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint filed by Pritchard was to recover for the breach of a covenant against incumbrances incorporated in a deed executed to him by defendant, Rebori.

It appears that the Southern Railway Company owns between Madison and Monroe avenues in the city of Memphis a right of way that extends fifty feet westward from the center of its track. This easement was acquired by its predecessor in title in the year 1855. The tracks of the railway at the place in question lie in a cut, the western slope of which does not take up the entire distance of fifty feet; that is to say, the top edge of the slope runs east of the true western limit of the right of way.

However, at the base of the slope the company has constructed a fence of heavy timbers which was evidently built for the purpose, in part at least, of hold-

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ing back the dirt that might slide from the slope. This fence is about fifteen feet from the track. There was nothing in the way of fence, posts, or markers in the western margin of the right of way to indicate where it was.

Pritchard was desirous of acquiring a site near the railway track on which to build a warehouse, and purchased a parcel of land from defendant for that purpose. The distance calls of the deed run to the fence at the base of the cut, considerably beyond the record showing as to the real western line of the right of way.

When Pritchard began to construct the warehouse he was notified by the railway company of its rights and his invasion thereof. On taking legal advice, he found that the building was being erected several feet within the limits of the legal right of way.

In order to remove the incumbrance and continue building operations, Pritchard conveyed two pieces of realty to the railway company, in return for which it quitclaimed to him that portion of the right of way which was covered by both the deed from defendant, Rebori, and the building, paying what is contended to be a fair price for the same.

To fairly set forth the points in dispute, it may be well to quote the description of the parcel contained in the deed executed by Rebori. The particularity and nicety of the distance calls will be noted.

“Beginning at a point, the intersection of the east line of South Lauderdale street with the north line of the first alley south of Madison avenue; running

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thence eastwardly with said alley forty (40) feet to the southwest corner of lot No. 13; thence continuing east with the south line of lots Nos. 11, 12 and 13 one hundred forty-six (146) feet, to a point in the west line of lot No. 10; thence south with the west line of lot 10 sixteen (16) feet; thence east fifty-two (52) feet to the Scroggings subdivision; thence northwardly with the west line of the Scroggings subdivision *thirty (30) feet to the right of way of the Southern Railroad*; thence northwestwardly with the line of said right of way two hundred sixteen (216) feet, to the northwest corner of lot No. 13; thence southwardly with the west line of lot No. 13 one hundred fifty-eight and five-tenths (158.5) feet to the northeast corner of lot No. 7 of the Armour subdivision; thence westwardly with the north line of lot No. 7, forty-seven and eight-tenths (47.8) feet to South Lauderdale street; thence south with South Lauderdale street fourteen and two-tenths (14.2) feet to the point of beginning."

The prime contention of Rebori is, that the line of the parcel that is underscored must stop at the real or record line of the right of way, and that, so stopping, the deed did not convey any land east of that line; therefore, that there is no incumbrance.

We are brought to a consideration of the rules of construction applicable in this action between the immediate vendor and vendee.

The general rule is that in determining boundaries resort is to be had, first, to natural objects or landmarks, because of their very permanent character,

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next, to artificial-monuments or marks, then to boundary lines of adjacent owners, and then to courses and distances. But this general rule, as to the relative importance of these guides to the ascertainment of a boundary of land, is not an inflexible or absolute one.

The use of the rule is a means to the discovery of the intention of the parties. To arrive at the intention of the parties to the instrument is the purpose of all rules of construction, and this applies to the description of premises conveyed as well as to other parts of the instrument.

It is not true, as appellant supposes, that there is such magic in a monument called for that it will be made to control in construction invariably. If it controls it is only because it is to be regarded as more certain than course or distance.

"If it should in a given case be less certain, the rule would fail with the reason for it and the monument would yield to the course and distance and an artificial monument will yield more readily than a natural one." Note 30 Am. Dec. 734, 740.

It is manifest that a mere adjacent boundary line would be caused to yield more readily to course and distance than would an artificial monument:

"When the call is for the line of another, it has also been held that course and distance may yield to it. But it is, obviously, not so decisive as the call for a natural boundary; and the mind may be under perfect conviction, from other circumstances, that the mistake is not in the course and distance, but in sup-

posing that the other had a line at the end of the course and distance. If that conviction exists, there ought to be no deviation from course and distance." *Carson v. Burnett*, 18 N. C., 546, 30 Am. Dec., 143; 1 Jones, Real Prop., section 383.

The rule that course and distance yield to monuments or adjacent boundary lines is usually applied in fuller force to large boundaries of land in the country, where mistakes in the use of a surveyor's chain may easily occur, and with less potency to land in towns or cities. This for a manifest reason:

"Where the lines are so short as evidently to be susceptible of entire accuracy in their measurement, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence as a means of ascertaining what is intended to be conveyed." *White v. Luning*, 93 U. S., 514, 23 L. Ed., 938.

Ordinarily surveys are not so loosely made where small and very valuable parcels are to be conveyed as in case of large boundaries, where the surveys are made on rough land or in forests; and there is not equal occasion for the application of the general rule that courses and distances are to be regarded as more uncertain, and must, therefore, give place to known monuments or boundaries, referred to as identifying the land. Where in such case it appears that courses and distances were intended by the parties to control they will be given that effect. The object in all boundary questions is to find, as nearly as may be, certain

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evidences of what particular land was meant to be included for conveyance. The natural presumption is that the conveyance is made after and with reference to an actual view of the premises by the parties to the instrument. The reason why a monument or adjacent line is ordinarily given preference over courses and distances is that the parties so presumed to have examined the property have, in viewing the premises, taken note of the monument or line.

In the case at bar the outer limit of the real right of way was not marked in any way; and the parcel was so small that it could be taken in by the contracting parties at a glance. The outer limit, therefore, lacked the element of open or manifest definiteness and fixity to constitute a boundary line that ought to be held to override the call of courses and distances. There were no right of way stakes or marks on the west boundary of the right of way to be visible, for purpose of demarcation, to the parties to the deed; and the right of way should be deemed to be undefined and without the characteristics of a monument, as against the call for distance. When a street or right of way is, as to limits, so unmarked and indefinite, it should not overrule the courses and distances of so small a parcel as this, every distance call of which would be changed in event of conformity thereto.

“Where, as in the infancy of a town, streets are only undefined portions of land dedicated to public use and themselves required to be located, they cannot be given controlling effect in fixing boundaries of

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other lands." 4 Rul. C. L., p. 103; 5 Cyc., 923; *Doe v. Riley*, 28 Ala., 164, 65 Am. Dec., 334; *Dolphin v. Klann*, 246 Mo., 477, 151 S. W., 956.

The fence, in the nature of a retaining wall, at the base of the slope of the cut, gave the contracting parties the impression that it marked the limit of the right of way on the west. The distances called for by the deed reach and terminate at this fence. The grantor, Rebori, had previously had the parcel surveyed so as to reach the fence. He supposed the fence to be the east line of his property, and it appeared that he so treated of it in the negotiations with Pritchard, who testifies that he would not have purchased unless the fence was in fact the line. Rebori admits that this is true. Both parties proceeded, therefore, on the assumption that the fence stood on the western line of the railway right of way, if proof of the facts may be looked to.

That it may not, is a contention of appellant, Rebori.

The rule in such case is well stated by Mr. Jones in his work on Real Property, section 466:

"A grant of land bounded upon a public street will be referred to the street as actually built and used, rather than to the street as shown upon a recorded plat or map. . . . It is like any other monument described as a boundary, a monument existing in fact. But where land is conveyed bounded by the line of a highway, parol evidence is admissible to show whether, by such description, the parties meant the surveyed

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line of the highway or the line actually used and occupied."

See, also, 2 Devlin on Deeds (3d Ed.), section 1015 (a); 5 Cyc., 867; *Wead v. St. Johnsbury, etc., R. Co.*, 64 Vt., 52, 24 Atl. 361.

The existence of the right of way constituted a valid outstanding incumbrance on the land, which the covenantee had a right to remove; and the rule is that he is entitled on doing so, as damages for the breach of the covenant against incumbrances, to recover the amount necessarily paid in the discharge, with interest, provided the expenditure was fair and reasonable. *Kenney v. Norton*, 10 Heisk. (57 Tenn.), 384; *Robinson v. Bierce*, 102 Tenn., 428, 52 S. W., 992, 47 L. R. A., 275; 3 Sedg. Damages (9th Ed.), section 978.

Other assignments of error are disposed of in a memorandum for decree. Affirmed.

Martin Furn. Co. v. Massey.

MARTIN FURNITURE Co. et al. v. J. D. MASSEY et al.*(Jackson. April Term, 1916.)***1. INJUNCTION. Bonds. Enforcement.**

Though an injunction bond was conditioned that, if complainant should pay such damages and costs as might be awarded by the chancery court in dismissing the bill, it should be void, but otherwise remain in full force, instead of following Shannon's Code, section 6257, declaring that, if the object be to enjoin a money demand after judgment, the penalty of the bond shall be double the judgment or sum sought to be enjoined, the condition of the bond was such that liability could be predicated thereon. (*Post*, pp. 341, 342.)

Case cited and approved: *Terrell v. Ingersoll*, 78 Tenn., 77.

Code cited and construed: Sec. 6257 (S.).

2. BANKRUPTCY. Discharge. Liability of sureties.

Shannon's Code, section 6264, declares that, on dissolution of an injunction to stay proceedings on the judgment for money, decree shall be entered against the claimant and his surety for such sum as the court may order. Sections 4485-4487 declare that, where an instrument is joint and several, suit may be brought against one or any of the obligors, and that the discharge of one does not effect discharge of the other. Complainant, who sought to enjoin execution on a money judgment, filed an injunction bond and, after the injunction was issued, was adjudicated a bankrupt. Bankruptcy Act July 1, 1898, chapter 541, section 16, 30 Stat. 550 (U. S. Comp. St. 1913, section 9600), declares that the liability of a person who is a codebtor with, or guarantor or surety for, a bankrupt, shall not be altered by the discharge of the bankrupt. *Held*, that the discharge of complainant, principal in the bond, did not, the injunction being dissolved, discharge the liability of the surety. (*Post*, pp. 342-345.)

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Cases cited and approved: *State v. Frankgos*, 114 Tenn., 76; *Brannon v. Wright*, 113 Tenn., 692; *Wolf v. Stix*, 99 U. S., 1; *Gibson v. Reed*, 54 Neb., 309; *Gyger v. Courtney*, 59 Neb., 555; *Martin v. Kilbourn*, 59 Tenn., 331.

Case cited and distinguished: *Stull v. Beddeo*, 78 Neb., 119.

Codes cited and construed: Secs. 4485-4487, 6264 (S.).

3. **BANKRUPTCY. Composition. Liability of sureties.**

As the release effected by composition of a bankrupt is one affected by operation of law and not mutual consent, the fact that a creditor, whose claim had been enjoined before the debtor was adjudicated a bankrupt, joined in favor of the composition, does not discharge the surety on the debtor's injunction bond. (*Post*, pp. 345, 346.)

FROM SHELBY

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
F. H. HEISKELL, Chancellor.

DUNCAN MARTIN, for complainant.

YANDELL HAUN, for defendants.

MR. A. H. GHOLSON, Special Judge, delivered the opinion of the Court.

A judgment was rendered August 25, 1914, for \$775.97 and costs, by a justice of the peace of Shelby

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county, Tenn., in favor of Mrs. Alice Wise, one of the defendants, against the complainant, Martin Furniture Company, on a note. An injunction bill was filed August 28, 1914, by said company seeking to restrain the collection of said judgment by Mrs. Wise. A fiat was granted by the chancellor directing the issuance of an injunction upon complainant entering into bond conditioned as required by law in the penalty of \$1,000. An injunction bond was executed, and the United States Fidelity & Guaranty Company became surety thereon. The writ of injunction was thereupon issued in accordance with the prayer of the bill.

Mrs. Wise answered, denying all of the material allegations of the bill. It is unnecessary to discuss the issues raised by said pleadings.

Said injunction bond was in the usual form, except as to the condition, which was as follows:

"Now, if the complainant shall pay such damages and costs as may be awarded by the chancery court in dismissing the bill, then this obligation to be void, otherwise to remain in full force and effect."

On June 11, 1915, counsel for the litigants filed in this cause an agreement and stipulation as to the material facts. Those necessary to mention are that on February 9, 1915, said Martin Furniture Company on its petition was duly adjudged a bankrupt; that said petition in the schedules made part thereof listed, among others, the note of Mrs. Wise as indebtedness claimed by her as "in suit and disputed;" that as part of her claim said Mrs. Wise filed in said bank-

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ruptcy proceeding her claim based exclusively on said justice's judgment and costs; that, at a meeting of the creditors for that purpose, Mrs. Wise voted affirmatively, and in writing accepted a composition proposed by said bankrupt, which composition was duly and legally confirmed by the bankrupt court; that by the terms of said composition said bankrupt was to pay its creditors twenty-five per cent. of their several debts in money, and the other seventy-five per cent. in preferred stock of the Southern Furniture Corporation; and that Mrs. Wise had accepted and received the avails of said composition due her.

Said agreement and stipulation further provided that the chancellor, on motion of the Martin Furniture Company, might consider and adjudicate all the questions involved and material as though raised by proper and formal pleadings, including plea of discharge in bankruptcy of said Martin Furniture Company.

The motion of said furniture company is not shown, but we assume that it was for a decree in its favor adjudging it, and the surety on its injunction bond, not liable to Mrs. Wise on account of its adjudication and discharge in bankruptcy and her action in accepting said composition of the bankrupt and receiving her share of the proceeds thereof. The parties have treated it as if a final decree had been entered to the effect that said injunction should not have been granted.

It is insisted that the condition of the bond is such that no decree can be rendered for the amount of the

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judgment when collection was enjoined. The requirements of section 6257 of Shannon's Code were not followed. But in the case of *Terrell v. Ingersoll*, 10 Lea, 77, an injunction bond with a similar condition, it was held that when one is enjoined from the collection of debts, and the debts are barred by the statute of limitations pending the injunction, the sureties on the bond are liable for the amount of the debts so barred.

The obligation was joint and several. The liability of the surety did not depend upon the rendition of a judgment against the principal. Shannon's Code, sections 4485-4487, inclusive; *State v. Frankgos*, 114 Tenn., 76, 85 S. W., 79; *Brannon v. Wright*, 113 Tenn., 692, 84 S. W., 612.

Under section 6264 of Shannon's Code, the defendant was entitled to a decree on the injunction bond for such an amount as the court should order. If the principal on said bond had been discharged, the surety should respond as in other cases of joint liability. *Wolf v. Stix*, 99 U. S., 1, 25 L. Ed., 309.

It is earnestly urged that, on account of the discharge in bankruptcy of the Martin Furniture Company, no judgment could be rendered against it; therefore none could be rendered against the surety on its injunction bond; also, that said discharge in bankruptcy of the principal released the surety.

Section 16 of the Bankruptcy Act is as follows:

"The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bank-

rupt shall not be altered by the discharge of such bankrupt."

Remington on Bankruptcy, vol. 2, p. 1394, says:

"The rights of the creditor against third parties jointly liable with the bankrupt, or secondarily for him, are not impaired by the bankrupt's adjudication nor by the bankrupt's discharge."

The thoroughly considered and annotated case of *Stull v. Beddeo*, 78 Neb., 119, 112 N. W., 315, 14 L. R. A. (N. S.), 507, is very much in point, and from it we quote:

"We have not overlooked the numerous cases cited by counsel, wherein sureties have been held to be released from liability by the discharge of their principals in bankruptcy. In each of those cases, however, it is clear that, in consequence of the discharge in bankruptcy, the contingency upon which the liability of the sureties had been dependent could never happen. *Wolf v. Stix*, 99 U. S., 1, 25 L. Ed., 309, which is included among the citations referred to furnishes an apt illustration of that class of bonds. There the court said: 'The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend.' But in the case at bar the condition of the bond is that

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'plaintiff shall pay to the defendants all damage which they may sustain by reason of said injunction, if it be finally decided that the injunction ought not to have been granted.' The contingency upon which the liability of the surety was made to depend, by the condition of this bond, was a final decision that the injunction ought not to have been granted. That contingency happened, and the liability of the surety on the bond became fixed, on the 6th day of June, 1904, when the injunction was dissolved, and the suit in which it had issued was dismissed. *Gibson v. Reed*, 54 Neb., 309, 75 N. W., 1085; *Gyger v. Courtney*, 59 Neb., 555, 81 N. W., 437.

"But it is argued that the condition of the bond is to pay the damages sustained by the plaintiffs when those damages are ascertained against the principal, and as they cannot now be thus ascertained, on account of the discharge in bankruptcy of the principal, the contingency upon which the liability of the surety depends can never happen. This argument, pushed to its logical conclusion, would render section 16 of the Bankruptcy Act, above quoted, almost, if not entirely, nugatory, because it is hard to conceive of a contract of suretyship to which it would not apply with as much force as to the one under consideration. The obligation is to pay the damage on the happening of a certain event. That event has happened. Section 16, *supra*, is to the effect that the discharge of the principal in bankruptcy does not release the surety from his liability to pay such damage. Before he can

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pay them, they must be ascertained; that is, the parties must agree upon the amount, or it must be established in an action on the bond. A statute which preserves a surety's liability, notwithstanding the discharge of the principal, but which at the time forbids the taking of a step essential to enforce the liability against the surety, would be a mockery."

The instant case is distinguished from *Martin v. Kilbourn*, 12 Heisk., 331, because the bond there was conditioned upon the securing of a judgment against the principal. No such requirement is present in this case.

It therefore follows that the adjudication and discharge in bankruptcy of the Martin Furniture Company did not discharge the surety on its injunction bond.

It is next insisted that the voting for and acceptance of the composition and receiving the avails or dividends thereunder worked a discharge of the surety. This contention is unsound. Remington on Bankruptcy, vol. 3, p. 2227 (2d Ed.) said:

"The release effected by a composition is a release by operation of law and not by mutual consent.

"The idea of composition with creditors is familiar. In its ordinary form it rests upon mutual consent and valuable consideration. But a composition in bankruptcy is different. A composition in bankruptcy restores the estate to the debtor and frees him from his debts, to be sure, but not by virtue of mutual consent or contract, but by operation of law. This distinction

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is of great importance in practice when it comes to considering the obligations of guarantors and sureties of debts owed by bankrupts. Were the composition a voluntary release, it might release the surety; being by operation of law, however, it would not have that effect, even if the statute did not provide, in section 16, that 'the liability of a person who is a codebtor with or guarantor or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such person.' "

See, also, Loveland on Bankruptcy (3d Ed.), p. 725; 32 Cyc., 227, and numerous cases there cited.

The learned court of civil appeals was correct in reversing the decree of the chancellor, who declined to order a reference to ascertain the damages of Mrs. Wise. She will be entitled to collect from the surety on the injunction bond the amount of her judgment, interest and costs thereon, to be credited, however, with the money and the value of the stock of the Southern Furniture Corporation received by her at the time.

The petition for *certiorari* is therefore denied.

Elmore v. State.

MRS. A. ELMORE v. STATE.
(two cases).

(Jackson. April Term, 1916.)

1. INTOXICATING LIQUORS. Evidence. Internal revenue license. Statute.

Acts 1903, chapter 355, making the payment of an internal revenue special tax as a retail liquor dealer *prima facie* evidence of sales within the law prohibiting sales of liquor within four miles of a schoolhouse, and Acts 1909, chapter 384, providing that in all prosecutions for violations of the law against the sale of intoxicating liquors copies of the records in the office of the internal revenue collector, showing defendant's payment of an internal revenue special tax as a liquor dealer, or the issuance of an internal revenue special tax stamp, when certified by the revenue collector, shall be competent evidence, are drastic and in derogation of the common-law rights of the citizen, and must not be too liberally construed against the citizen. (*Post*, pp. 349, 350.)

Acts cited and construed: Acts 1913, ch. 355; Acts 1909, ch. 384.

Case cited and approved: Brinkley v. State, 125 Tenn., 371.

2. CRIMINAL LAW. Reception of evidence. Identity of accused. Liquor license.

In a prosecution for selling liquor within four miles of a schoolhouse, evidence *held* not to sufficiently identify the accused with one Mae Elmore to permit the introduction in evidence of a federal liquor license to one Mrs. Mae Elmore to engage in the business of retail liquor dealer. (*Post*, pp. 349, 350.)

3. INTOXICATING LIQUORS. Offense. Issues and proof. Schoolhouse.

In a prosecution for selling liquor within four miles of a schoolhouse, the existence of a schoolhouse, where school is ordinarily kept, within four miles of defendant's place of business, is a

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fact which must be averred in the indictment and proven on the trial, notwithstanding Acts 1909, chapter 1, which extended the four-mile law to the whole state. (*Post*, pp. 350-352.)

Cases cited and approved: *Kelly v. State*, 123 Tenn., 516; *Motlow v. State*, 125 Tenn., 560.

FROM SHELBY

Error to the Criminal Court of Shelby County.—
THOS. W. HARSH, Judge.

D. B. SWEENEY, for plaintiff in error.

WM. H. SWIGGART, Assistant Attorney-General, for
the State.

MR. SWIGGART, Special Judge, delivered the opinion
of the Court.

This is an appeal in the nature of a writ of error, in two cases, from the judgments of the criminal court of Shelby county, wherein the plaintiff in error, Mrs. A. Elmore, hereinafter called the defendant, was fined \$50 and committed to the workhouse for three months, in both cases for selling liquor within four miles of a schoolhouse.

The principal errors assigned for a reversal are:
(1) That there is no proof that the alleged sales were made within four miles of any schoolhouse; (2) that

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the court was in error in permitting the State to put in evidence against her, over her objection, a certified copy of the internal revenue license, issued to one Mrs. Mae Elmore, 320 High street, Memphis, Tenn. This federal license to engage in the business of a retail liquor dealer was issued on October 19, 1915, and covers the period from July 1, 1915, to June 30, 1916, and was issued in the name of Mrs. Mae Elmore.

Defendant insists that the State failed to connect her with this federal liquor license in any manner, or to show that it was issued to her, or that she ever lived at 320 High street in Memphis, or that her name is Mae Elmore, or that she was ever known by that name and, therefore, that this document was incompetent as against her. It was shown that defendant once lived on High street, but not that she lived at 320 High street. She is shown to have left that community, in the summer of 1915, because the police were "hot after her." But when the present cases were begun she was running a grocery store about six miles out in the country from the city, at a place called "South Speedway and Horn Lake Road." There is no proof showing that she was the same person as Mrs. Mae Elmore, although the proof creates a strong suspicion that she may be the same person. Still the court thinks that her identity with Mae Elmore is not sufficiently proven to warrant the introduction as evidence of this federal liquor license against her, and that the trial court committed error in permitting the State to introduce this document against her. The act

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of the legislature making such a liquor license competent evidence, and also *prima facie* evidence, of guilt is a drastic statute, and is in derogation of the common-law rights of the citizen. See Acts 1903, chapter 355; Acts 1909, chapter 384; *Brinkley v. State*, 125 Tenn., 371-388, 143 S. W., 1120. While these statutes are in keeping with sound public policy, now generally acquiesced in, still they must not be too liberally construed against the citizen. Before a conviction should be allowed to stand, where it is based upon the presumption of guilt under these acts, it ought to be clearly shown that the defendant took out the federal license, or had some guilty connection therewith.

Again, the second assignment of error, to the effect that the State failed to prove that there was a schoolhouse, where school is ordinarily kept, within four miles of the place of business of defendant, or the place where it is claimed by the State that the liquor was sold, is well made and must be sustained. The bill of exceptions does not show any such proof, or that the State in any way offered to make such proof, of the existence of the schoolhouse.

We think that this is an essential fact to be averred in the indictment or presentment, and that it must be proven on the trial. The existence of a schoolhouse within four miles of the place where the sale of liquor was made is of the essence of the offense, and without such proof, there can be no conviction under a presentment or indictment charging the sale of liquor within four miles of a schoolhouse. The assistant

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attorney-general submits to the court, in a plausible argument found in his brief, that now, since the passage of Acts 1909, chapter 1, extending the four-mile law to the whole State, in effect, that actual proof of the existence of schoolhouse within four miles of the place of sale is rendered unnecessary, and that the court and jurors may take judicial knowledge of the fact that there is no place within the State where such sales could be made without being within four miles of a schoolhouse. He refers the court to the language of this court in *Kelly v. State*, 123 Tenn., 516, 533, 132 S. W., 193, and the case of *Motlow v. State*, 125 Tenn., 560, 561, 145 S. W., 177. It is true this court did use language in those cases indicating that the whole State was practically covered by this four-mile statute, which is probably true; but the court was speaking historically about the effect of this act of 1909, and did not intend to say that such proof was rendered unnecessary, or could be dispensed with, on the trial of these four-mile cases. The indictments in the present cases do not charge the sale of liquor without license, but specifically that the sales were made within four miles of a schoolhouse. Before there can be a conviction under such an indictment, the State must prove, not only that there was a sale of intoxicating liquors, but that it was made within four miles of a schoolhouse, where a school is ordinarily kept, in the State. Without such proof, the chief element of the offense charged would be lacking. There should not

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be, in the very nature of the cases, any difficulty in making such proof, if in fact there was a schoolhouse located within four miles of the place in question. For these reasons, the verdicts and judgments in these cases will be set aside, and new trials granted.

SOUTH MEMPHIS LAND CO. v. MEMPHIS INTERURBAN
Co. *et al.*

(*Jackson*. April Term, 1916.)

1. COVENANTS. Covenants running with land. Binding force. Covenants running with the land bind even purchasers at sales *in invitum*. (*Post*, pp. 363, 364.)

Cases cited and approved: *Shelby v. Hearne*, 14 Tenn., 512; *Bream v. Dickerson*, 21 Tenn., 126; *Cronin v. Watkins*, 1 Tenn. ch., 119; *Hite v. Parks*, 2 Tenn. ch., 374; *Brooks v. Smith*, 1 Shan. Cas., 158; *Doty v. Railroad*, 103 Tenn., 564; *Cicalla v. Miller*, 105 Tenn., 255; *Clapp v. Wilder*, 176 Mass., 332.

2. RAILROADS. Conveyances. Construction. Conditions subsequent. Right of way.

A contract to which deed for a right of way referred, whereby a land company granted an interurban railroad a right of way "on the following conditions," that it would grade the way, etc., with a forfeiture providing for a breach of condition, which necessarily implied the right of re-entry, created condition subsequent, rather than covenants running with the land, so that a purchaser in insolvency proceedings and its successors were not affected thereby. (*Post*, pp. 364-366.)

Cases cited and approved: *Blanchard v. Railroad Co.*, 31 Mich., 43; *Emerson v. Simpson*, 43 N. H., 475; *McCue v. Barrett*, 99 Minn., 355; *Woodruff v. Trenton Co.*, 10 N. J. Eq., 489; *Randall v. Wentworth*, 100 Me., 177; *Trustees of Union College v. New York*, 65 App. Div., 553; *Hammond v. Railroad*, 15 S. C., 10.

Case cited and distinguished: *Gray v. Blanchard*, 8 Pick., 284.

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3. DEEDS. Estates on condition. Creation.

While the words "this conveyance is upon the condition" are usually held to create an estate on condition, they do not necessarily create one, but may be so controlled by other words in the instrument as to fall of that effect. (*Post*, pp. 366-372.)

Cases cited and approved: *Episcopal City Mission v. Appleton*, 117 Mass., 326; *Sohler v. Trinity Church*, 109 Mass., 1; *Chapin v. Harris*, 8 Allen (Mass), 594; *Stanley v. Colt*, 5 Wall., 119; *Laberee v. Carleton*, 53 Me., 211.

Cases cited and distinguished: *Cromwell's case*, 2 Co., 71; *Bear v. Whisler*, 7 Watts (Pa.), 144; *Merritt v. Harris*, 102 Mass., 326; *Blanchard v. Railroad Co.*, 31 Mich., 43; *Emerson v. Simpson*, 43 N. H., 475; *McCue v. Barrett*, 99 Minn., 355; *Trustees of Union College v. N. Y.*, 65 App. Div., 553.

4. DEEDS. Estates on condition. Creation.

The words relied on as creating the condition on which an estate depends must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it, and a condition may be created by reference to a condition contained in another instrument, as by reference in a deed to an agreement to convey, with recital that the deed is made pursuant thereto. (*Post*, pp. 366-372.)

FROM SHELBY

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

MCKELLAR & KYSER and SIVLEY & EVANS, for appellant.

METCALF & METCALF, BURCH & MINOR and WRIGHT, MILES, WARING & WALKER, for appellees.

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MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill alleges that complainant, being the owner of a large body of land lying immediately south of the corporate limits of the city of Memphis, which had been platted into several subdivisions, conveyed, on the 28th day of February, 1909, a right of way over and across its lands to the Lakeview Traction Company, and that contemporaneously therewith a contract was entered into between the parties which, with the deed for the right of way, constitute one instrument. The deed for the right of way reads:

“That for and in consideration of the sum of \$5, and and other good and valuable considerations, to us in hand paid, at the time of the execution of these presents, receipt of which is hereby acknowledged, the South Memphis Land Company, a corporation of Tennessee, hereby grants, warrants, and conveys unto the Lakeview Traction Company, a corporation of Maine, its successors and assigns, an easement in and to a strip of land in Shelby county, Tennessee, south of the city of Memphis, twenty-five feet in width, as and for a right of way being twelve and one-half feet on either side of a line particularly described as follows: (Here follows a description of the right of way, beginning in the center of Nonconnah creek, and running northward to Axie avenue.)

“The grant of said strip is for a right of way for railroad purposes, and is made subject to all terms and conditions of a certain contract which is executed

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contemporaneously with this deed and is made a part hereof."

The contract referred to was first drawn in the form of an agreement to convey, and subsequently was adopted as the contract between the parties at the time that the deed for the right of way was made. This origin of the matter will account for the language "will grant" now to follow. The contract, so far as necessary to quote it, reads:

"That the South Memphis Land Company will grant to the Lakeview Traction Company a right of way twenty-five feet in width from Axie avenue, on the north, to its line on the south, upon the lines indicated on your blueprints accompanying, on the following conditions:

"(1) That the Lakeview Traction Company will within twelve months from date of this agreement grade a right of way having a width of twenty-eight feet at all points except at the crossing of the I. C. Belt Line and the Union Belt Line, extending from Axie avenue to Brooks avenue; it being understood that fifteen feet of this right of way is for wagon road purposes, and must be of the grade the same as that of the traction company.

"(2) That the Lakeview Traction Company provide a safe passage for vehicles of fifteen or more feet at the crossings of the I. C. Belt Line and the Union Belt Line; it being intended that this passageway may occupy the same space as that occupied by the traction company's tracks at these two points.

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“(3) That the traction company at its option shall, within five years, construct and grade an avenue along this right of way of seventy-five feet in width, of grade the same as that of the traction company. The object of this paragraph is to provide for the completion of an avenue seventy-five feet wide by the traction company within five years from the date of this contract, between the north and south lines of the land company's property. After the avenue shall have been so widened, the right to use any part of the right of way for wagon purposes, except crossings, shall cease.

“(4) That the dirt from the cuts must be used to make the necessary fills, and none shall be taken off any of the property of the land company which is below grade, to make fills, without the consent of the land company; the object of the paragraph being to prevent borrow pits along the right of way.

“(5) That the Lakeview Traction Company is granted this right of way for the construction and operation of an interurban road, the cars of which are to be electrically driven, and at no time shall engines driven by steam be allowed to operate on the track or tracks located thereon, nor shall any power be used to operate cars over these tracks, except such as may be permissible over the streets of the city of Memphis, and, further, that no transfer shall be made of the right herein granted to any steam railroad.

“(6) That no freight cars will be parked or allowed to stand on the right of way covered by this contract.

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“(7) That the fare for passengers between South Memphis and Memphis, and between stops in South Memphis, shall at no time be higher than the fare within the city limits of Memphis.

“(8) That the freight rates to and from South Memphis shall not be higher than to and from Memphis proper.

“(9) That any street or steam railway railway shall have the right to cross the tracks of the traction company on the right of way herein granted.

“(10) That the traction company shall provide and maintain street crossings of this right of way.

“(11) That the traction company will begin operations of cars on its tracks, on the right of way herein granted, not later than twenty months after the signing of this contract, and the failure to so operate its cars for a period of thirty days or more after their operations have begun shall cause this contract to be canceled, and right of way revert to the land company.

“(12) That the traction company will at no time allow any nuisance along the lines of its tracks on the right of way covered by this contract.

“(13) That passenger cars such as are used on modern interurban lines will be operated on the tracks of the traction company over the right of way covered by this contract.

“(14) That the traction company will agree that the land company may have the option until August 2, 1908, of taking the contract for the grading of the line from Axie avenue to Nonconnah creek, except

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immediately underneath the Memphis & State Line Railroad tracks, for twenty cents per cubic foot."

The purpose of the land company was to construct an interurban railway from Lakeview, Miss., north to the city of Memphis, in Tennessee.

It is alleged that the line was graded on complainant's land, but that, in fact, the railway was constructed from Lakeview, Miss., only as far north as Dempster avenue, in complainant's subdivision, which was more than a mile short of Axie avenue; that on the 12th day of August, 1910, complainant granted to the Lakeview Traction Company a temporary license to proceed westward from Dempster avenue to a point where it would strike the line of the Memphis Street Railway Company at Lauderdale street, in the city of Memphis; that the railway company has since entirely abandoned the line north of Dempster avenue in violation of the terms of the contract above set out; that after the granting of the license above mentioned the Lakeview Traction Company became insolvent, and was placed in the hands of a receiver, and its property was sold and was purchased by H. D. Minor, trustee for the bondholders of the insolvent company, at a bid of \$150,000; that this sale was at the October term, 1912, reported and confirmed in the chancery court of Shelby county; that the purchasing bondholders constituted a corporation under the name of the Memphis interurban Railway Company, one of the defendants in the present bill, and the title was vested in the said company; that the Memphis Inter-

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urban Company operated the property as above indicated until about the 10th day of April, 1913, shortly after which date the property was sold to a new corporation organized under the laws of the State of Delaware by T. H. Tutwiler and his associates under name of Memphis & Lakeview Railway Company; that in the conveyance which was executed to the latter company it undertook to relieve itself "from the conditions, terms, and covenants referred to in said deed."

It is alleged in the bill that the various provisions of the contract were covenants running with the land, and that all the defendants were bound thereby including the last-named company.

It is alleged:

"That practically all of the conditions contained in the said contract of July 23, 1908," being the contract previously quoted, which was originally dated July 23, 1908, "have been breached by the Lakeview Traction Company and its assigns, and that, notwithstanding the said breach by the said Lakeview Traction Company and its assigns, the defendants the Memphis Interurban Company and the Lakeview Railway Company have taken possession of the said right of way, and have declined and refused to comply with and carry out the conditions of said contract and the covenants running with said real estate, and that it and the other defendants are attempting by reason and on account of said change of corporations and of corporate names to obtain the benefits of said contract, and to take, hold, and use the property of your orator, and

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at the same time not observe the conditions, covenants, and agreements therein contained.”

It is further alleged:

“That the Memphis Interurban Company under said sale above referred to took possession of the tracks of the Lakeview Traction Company, laid upon the above-described land, and operated its cars over the same, and that the defendant Memphis & Lakeview Railway Company, under the contract and deed from the Memphis Interurban Company, has taken charge of the same, and is now operating its cars over said right of way, and that the Memphis & Lakeview Railway Company has stated to your orator that it is not using any other line for the operation of its cars to a connection with the Memphis Street Railway, except that set forth in the above license (that is, from Dempster avenue westward, as above mentioned), and it declines and refuses to extend its line of railway north through the property of your orator over and along the right of way deeded to the Memphis & Lakeview Railway Company, which has been graded, but states that it will operate over the line set forth in said license, claiming authority so to do, as your orator is informed, under the deed from the Memphis Interurban Company.”

The purpose of the bill was to obtain a specific performance of the contract, but, if that relief could not be granted, then, in the alternative, damages for the failure of performance.

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There were numerous grounds of demurrer filed by defendants, all of which were sustained by the chancellor, and the bill dismissed.

We need mention only two of the grounds referred to, one that the provisions set out in the contract were not covenants running with the land, and the other that they constituted conditions subsequent.

On appeal the court of Civil appeals reversed the decree of the chancellor in part, and held that, while the defendants were not bound to extend the line further north than Dempster avenue, yet they were bound to comply with the other provisions of the contract as to the part of the line over which they had actually constructed the railway, and particularly that they were bound to construct the avenue of seventy-five feet along the right of way so far as the line had been actually constructed. The court of civil appeals was of opinion that the various provisions of the contract constituted covenants running with the land.

The complainant's contention is that the deed and accompanying contract, constituting together but one instrument by the express agreement of the parties, should be construed as one, and that, so construed, the provisions of what may be styled the contract paper are covenants running with the land, and binding on the present owner, the Memphis & Lakeview Railway Company. The defendants insist that, if the provisions referred to are in law covenants, they are not such covenants as run with the land, but only of a personal nature, binding solely upon the Lakeview Trac-

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tion Company; that they do not affect the Memphis Interurban Company, that purchased under the insolvency proceedings instituted against the Lakeview Traction Company, or the defendant Memphis & Lakeview Railway Company, that purchased from the Memphis Interurban Company; that the defendants are not affected by such alleged covenants, for the additional reason that their purchase at the court sale referred to was under a decree rendered in a general creditors' proceeding, which was binding on the complainants and all others having demands against the property of the Lakeview Traction Company, since under such a proceeding the purchaser buys free of all debts of the insolvent corporation which are not liens on the property. It is further contended for the defendants that the provisions of the contract paper referred to constitute, not covenants, but by the very terms thereof conditions subsequent, and that complainant's rights are such only as may be enforced under that aspect.

It is obvious that the fundamental question is whether the provisions referred to are covenants running with the land, or simply conditions. If the former, they would, of course, bind even purchasers at sales *in invitum* (*Spencer's Case*, 5 Coke, 16; 1 Smith, Leading Cas., 129, 131, 132, resolution No. 6), and hence the Memphis Interurban Company and the purchaser from it, the defendant Memphis & Lakeview Railway Company. The authority just referred to is the great leading case on the general subject, to which

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all other cases refer, directly or indirectly, and on which all of them are based. We have only a few cases on the subject (*Shelby v. Hearne*, 6 Yerg. [14 Tenn.], 512; *Bream v. Dickerson*, 2 Humph. [21 Tenn.], 126; *Cronin v. Watkins*, 1 Tenn. Ch., 119; *Hite v. Parks*, 2 Tenn. Ch., 374; *Brooks v. Smith*, 1 Shan. Cas., 158; *Doty v. Railroad*, 103 Tenn., 564, 53 S. W., 944, 48 L. R. A., 160; *Cicalla v. Miller*, 105 Tenn., 255, 58 S. W., 210), and in none of them is a different rule suggested.

But this view of the subject need not be further considered, since we are clearly of the opinion that the provisions referred to are conditions subsequent, and not covenants at all.

It is often extremely difficult to determine whether a provision is one or the other, a condition or a covenant, owing to the disinclination of the courts to enforce forfeitures, resulting in many confusing precedents, which, by subtle construction, have found covenants, or restrictions merely, in language apparently, on first consideration, at least, expressing only conditions subsequent. This phase of the matter will be found well illustrated in the opinions, original and dissenting, and authorities cited therein, in the case of *Clapp v. Wilder*, 176 Mass., 332, 57 N. E., 692, 50 L. R. A., 120-127.

In the case before us, however, we think there is little room for doubting that the contract created conditions subsequent, rather than covenants. *Gray v. Blanchard*, 8 Pick. (Mass.), 284; 1 Leading Cas. in

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Am. L. of Real Prop., 115, and note; *Blanchard v. Detroit, Lansing & Michigan Railroad Company*, 31 Mich., 43, 18 Am. Rep., 142; *Emerson v. Simpson*, 43 N. H., 475, 82 Am. Dec., 168, 80 Am. Dec., 184; *McCue v. Barrett*, 99 Minn., 355, 109 N. W., 594; *Woodruff v. Trenton Co.*, 10 N. J. Eq., 489; *Randall v. Wentworth*, 100 Me., 177, 60 Atl., 871; *Trustees of Union College v. New York*, 65 App. Div., 553, 73 N. Y. Supp., 51; *Hammond v. Railroad*, 15 S. C., 10, 31-35.

The words used in the contract "on the following conditions" are those long recognized as strongly indicative, even if not wholly conclusive, of a purpose to create an estate on condition; and this conclusion is strengthened and rendered well-nigh irresistible by the provision for a forfeiture contained in the 11th paragraph.

In *Gray v. Blanchard*, supra, the words were "provided, however, this conveyance is upon condition that," etc. It was contended there, as here, that these words introduced only a covenant. But Chief Justice Parker said:

"This is untenable. The words are apt to create a condition; there is no ambiguity, no room for construction; and they cannot be distorted so as to convey a different sense from that which was palpably the intent of the parties. . . . 'This conveyance is, upon the condition,' can mean nothing more nor less, than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions, by converting conditions into cove-

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nants. . . . A clause of re-entry is not necessary to make a condition. *Proviso, ita quod, subconditione*, make the estate conditional."

But, as already stated, in the case before us, we have a forfeiture provided for breach of the conditions laid down, which necessarily implies the right of re-entry.

It is true, as stated in the note referred to, that while the technical words quoted are usually held to create an estate on condition, they do not necessarily create one, but may be so controlled by other words in the instrument as to fail of that effect. In *Cromwell's Case*, 2 Co., 71, a, it was settled that:

Though the words mentioned are apt to make a condition, "yet, to confer upon them this effect, three things are necessary: First, that the clause wherein they occur has no dependence on another in the deed, but stands originally by and of itself; second, that it be the language of the feoffor, donor, lessor, etc., or may be attributed indifferently to both; and, third and principally, that it be compulsory to enforce the bargainee, feoffee, donee, etc., to do an act the omission of which may work a forfeiture."

Cited also to the same point: *Episcopal City Mission v. Appleton*, 117 Mass., 326; *Sohier v. Trinity Church*, 109 Mass., 1; *Chapin v. Harris*, 8 Allen (Mass.), 594; *Stanley v. Colt*, 5 Wall., 119, 18 L. Ed., 502.

All of the marks mentioned occur in the case before us. It is true that the words relied on as creating a

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condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it (*Laberee v. Carleton*, 53 Me., 211); but "a condition may be created by a reference in an instrument to a condition contained in another paper, as by reference in a deed to an agreement to convey with a recital that the deed is made in pursuance thereof." (*Bear v. Whisler*, 7 Watts [Pa.], 144; *Merritt v. Harris*, 102 Mass., 326). In the case we have in hand we have seen there is not only a reference in the deed to such an agreement, but that agreement is expressly made a part of the conveyance itself, by the very terms of the deed.

It is said further, in the elaborate note referred to:

"A condition may be made of almost anything that is not illegal or unreasonable, on the principle that the owner of land who is not obliged to transfer it at all may attach to its transfer such conditions and restrictions as he pleases, and in view of which the grantee takes the land, so long as they are not in contravention of any policy of law."

Here it may be useful to give some illustrations from the cases we have cited.

Blanchard v. Detroit, Lansing & Michigan Railroad Company:

"But this conveyance is made upon the express condition that said railroad company shall build, erect, and maintain a depot or station house on the land herein described, suitable for the convenience of the public,

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and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot."

This language was held to create a condition subsequent.

Emerson v. Simpson:

"Provided, nevertheless, if the said George Simpson shall neglect to keep up and maintain forever, at his own expense, a good and lawful fence, constructed of wood or stone, on the line between his own land and land of said Ames and James Emerson, this deed shall be void," etc.

Held, a condition subsequent.

McCue v. Barrett:

"In consideration of the foregoing release and conveyance of the above-described strip of land to him, James Barrett for himself, his heirs and assigns, hereby agrees to and with Edward Malz, his heirs and assigns, that he will keep and maintain at his own expense, from this time forth forever, a good and lawful fence (describing the kind of fence), and to rebuild and repair the same at any and all times when such rebuilding and repairing shall be necessary. . . . And it is further mutually agreed and understood by and between the parties, their heirs and assigns, that in case Barrett, his heirs and assigns, shall fail to build and maintain such fence, or shall refuse to build or repair the same when necessary, then and in that case it is mutually understood and agreed that this

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agreement shall be void, and of no effect, and all rights hereby conveyed and released by Malz . . . shall revert to Malz, his heirs and assigns forever. The said release and conveyance of said strip of land to said party of the second part is upon the express condition of the building and maintaining said fence, and the failure to so build and maintain the same and repair the same to work a forfeiture of all rights thereunder."

The foregoing language was held to create a condition subsequent.

Woodruff v. Water Power Co.:

The owner of a valuable farm on the river Delaware, conveyed to the Trenton, Delaware Falls Company, their successors and assigns, a portion of his farm adjoining the river, and upon which they had located their main raceway, "subject, nevertheless, to the following proviso: That if the said main raceway shall not be made on said premises in conformity to the act incorporating said company, the said lands and premises shall revert to the said George Woodruff, his heirs and assigns, and also that the said party of the second part shall erect, maintain, and keep in good repair a safe, convenient, and substantial bridge across said main raceway, at a place to be designated by the said (grantor), and also cause to be made and kept in order a convenient landing place on the side next the river Delaware, so that wagons may at all times safely pass over thereon, and shall also erect and

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maintain all necessary fences across the said main raceway, together with fences across the said premises, and shall also permit the said party of the first part to use the said raceway to give drink to his cattle, and also to take ice therefrom to fill his icehouse."

The grantees cut the main raceway, and it subsequently came into the possession of the defendants, as assignees of the grantees, by virtue of several acts of the legislature. The bill alleged that the grantees had always refused to perform "their said covenants and agreements," and prayed a specific performance, and compensation for the injury sustained. It was held that there were no covenants contained in the deed on the part of the grantees; that the language was appropriate to create a condition, and that as if to avoid any doubt the legal consequences of a breach in violation of the condition was inserted; that the court could not enforce its specific performance in a deed of that which for nonperformance there might be a forfeiture of the estate; that the grantor had fixed his own remedy, and could forfeit the estate at his pleasure.

Trustees of Union College v. New York:

The land in question was conveyed in 1873 to Long Island City, the predecessor of New York City. After the description the deed contained this clause:

"Said plat of land is to be used by said Long Island City for the purpose of building a city hall thereon, and this conveyance is made upon the express condition that, in case the said plot of ground above described shall ever cease to be used by said Long Island

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City for a city hall, or other similar city buildings, then, and in that case, the said plot of land shall revert back to the parties hereto of the first part as if this conveyance had not been made."

This was held to create an estate on condition subsequent, and subject to forfeiture for failure to comply with the condition.

Hammond v. Railroad:

A deed conveyed a strip of land to a railroad company, to them, their successors and assigns forever, "provided always, and this deed is upon the express condition," that a certain system of drainage was to be kept up by the railroad company. It was held that this created a condition subsequent in the deed, and the conveyance was voidable by the grantor upon condition broken.

It is true that a condition subsequent is usually relied on by the grantor, but occasionally, as here, and in *Blanchard v. Detroit, etc., Railroad Company*, supra, by the grantee or his assigns, for the purpose of defeating an action based on covenant. We cannot know whether the defendant, to defeat a future enforcement of the conditions, relies upon some ground of estoppel, or upon the fact that the complainant is not likely to deprive itself of such benefits as it already enjoys by the maintenance of the road through a considerable part of its subdivision. We have but to determine the case upon the principles of law that govern it, and leave the parties to their legal rights as so determined.

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On the grounds stated, we think the chancellor reached the correct conclusion, and his decree must be affirmed, and that of the court of civil appeals reversed.

H. L. QUINN v. J. T. HESTER.*

*(Jackson. April Term, 1916.)***1. TAXATION. Special statutes. Constitutionality.**

Chapter 667, Priv. Acts 1915, incorporating a school district, levying a school tax on such district, and providing for its collection by the county trustee, is not in contravention of constitution article 2, section 29, forbidding the delegation of the power of taxation except to counties or incorporated towns. (*Post*, pp. 376, 377.)

Acts cited and construed: Priv. Acts 1915, ch. 667.

Cases cited and approved: *Keese v. Civil District*, 46 Tenn., 127; *Waterhouse v. Cleveland Pub. Schools*, 55 Tenn., 857; *Lipscomb v. Dean*, 69 Tenn., 546, *Smith v. Carter*, 131 Tenn., 1.

Constitution cited and construed: Sec. 28, art. 2; Sec. 29, Art. 2.

2. TAXATION. Special statutes. Constitutionality.

Nor is it in contravention of constitution article 2, section 28, requiring equality and uniformity of taxation, since such constitutional provision does not prevent local taxation for local purposes. (*Post*, pp. 377, 378).

Case cited and approved; *Louisiana v. Pillsbury*, 105 U. S., 278.

Case cited and distinguished: *King v. Sullivan County*, 128 Tenn., 393.

Constitution cited and construed: Art. 2, sec. 28.

3. STATUTES. Constitutionality of special acts.

Nor is it contravention of constitution article 11, section 8, providing that the legislature shall have no power to suspend any general law for the benefit of any particular individual, etc., since such constitutional provision does not inhibit legislation respecting municipal or public corporations. (*Post*, pp. 378-380.)

*On special assessment as a tax see note in 3 L. R. A. (N. S.), 837.

As to what boards or bodies the power of taxation may be delegated see notes in 15 L. R. A. (N. S.), 61; 32 L. R. A. (N. S.), 1078.

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Cases cited and approved: Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn., 151; Ballentine v. Pulaski, 83 Tenn., 633; State v. Wilson, 80 Tenn., 246; Williams v. Nashville, 89 Tenn., 487; Redist. Cases, 111 Tenn., 234; Todtenhausen v. Knox Co., 132 Tenn., 169; State ex rel. v. Cummings, 130 Tenn., 566.

Constitution cited and construed: Sec. 29, art. 2; Sec. 8, Art. 11.

4. TAXATION. Legislative power to levy local taxes.

In the absence of constitutional restriction, the legislature has plenary power to levy taxes for local purposes. (*Post*, pp. 378-380.)

5. CONSTITUTIONAL LAW. Legislative power. Policy.

The power of legislature is limited only by the Constitution, and its acts cannot be declared unconstitutional merely for reasons of policy. (*Post*, pp. 380, 381.)

Cases cited and approved: Demoville v. Davidson County, 87 Tenn., 214; Re Forked Deer Drainage Dist., 133 Tenn., 684; Arnold v. Knoxville, 115 Tenn., 195; State ex rel. v. Powers, 124 Tenn., 553.

FROM CARROLL

Appeal from the Chancery Court of Carroll County.—J. W. ROSS, Chancellor.

P. W. MADDOX, for appellant.

JNO. T. PEELEB, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

The bill in this case challenges the constitutionality of chapter 667 of the Private Acts of 1915. This stat-

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ute undertook to create a school district in Carroll county, and to levy a tax for school purposes within this district. The bill sought to enjoin the collection of said tax. A demurrer was filed which the chancellor overruled; he being of opinion that the statute was invalid. The defendant has appealed to this court.

The statute in question undertook to incorporate the "Trezevant special school district" in Carroll county, defined its boundaries, named the first school board, provided for the election of their successors, and set out the powers and duties of said board or corporation. It was enacted that the trustee of Carroll county, within which the district lay, should apportion to the school district its *pro rata* share of the county school fund and its *pro rata* share of the State school fund paid to the county by the State, for the support of the schools which said corporation was authorized to maintain. The legislature levied a tax of forty cents on every \$100 worth of taxable property, both real and personal, within said school district, and a poll tax of \$1 on all male persons between the ages of twenty-one and fifty years within said school district. The basis of assessment was the assessed value of the property in said district as shown by the books of the county trustee, and it was provided that this special tax be collected in the same manner and at the same time as all other taxes were collected under the general laws of the State by the county trustee.

Other provisions of the act are not material to the questions before us for decision.

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Several constitutional objections are urged against the statute, all of which, however, may be grouped under three heads:

(1) It is said that the act is in contravention of section 28 of article 2 of the Constitution as to uniformity of taxation.

(2) That the act is in contravention of section 29, art. 2, of the Constitution, which impliedly forbids the general assembly to delegate the power of taxation except to counties or incorporated towns.

(3) That the act contravenes section 8, art. 11, of the Constitution, which declares that the legislature shall have no power to suspend any general law for the benefit of any particular individuals, etc.

Considering the second objection first, an examination of the act shows that there has been no attempt whatever to delegate the power of taxation. The tax for which the act provides is imposed directly by the legislature. No discretion whatever concerning the imposition of this tax is left to the school district. The rate of the tax is fixed and the levy is made by the statute, and the collection of the tax committed to the county trustee, who is directed to collect it along with all other taxes according to the general laws of the State. Inasmuch as there is no attempted delegation of authority to the school district, section 29 of article 2 of the Constitution has no application. *Keese v. Civil District*, 46 Tenn. (6 Cold.), 127, *Waterhouse v. Cleveland Public Schools*, 55 Tenn. (8 Heisk.), 857, *Lipscomb v. Dean*, 69 Tenn. (1 Lea), 546,

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and *Smith v. Carter*, 131 Tenn., 1, 173 S. W., 430, are not in point.

The provisions of section 28 art. 2, of the Constitution requiring equality and uniformity of taxation throughout the State do not prevent local taxation for local purposes. Such provisions do not demand equality and uniformity as between different localities in the matter of local taxation. Such local taxes must merely be equal and uniform in the district to which they apply.

This court has said:

"The uniformity required by section 28, article 2, is limited to uniformity in rate assessment and valuation of the particular tax involved. It has no reference to a uniformity of the sum total of taxes which a citizen is required to pay; that is, it does not require that the total taxes assessed against property situated in a municipality shall not exceed the sum total of taxes assessed against property located outside of a municipality. It does require that there shall be uniformity of valuation and assessment of property for purposes of taxation, and that the tax levy for any given purpose shall be uniform through the territory to which it is applied." *King v. Sullivan County*, 128 Tenn., 393, 160 S. W., 847.

Most of the States have similar constitutional provisions, and such constitutional provisions have universally been construed as just indicated. 37 Cyc., 734, and cases cited. Such construction has received

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approval of the supreme court of the United States in *Louisiana v. Pilsbury*, 105 U. S., 278, 26 L. Ed., 1090.

The very language of section 29 of article 2 of the Constitution which authorizes the legislature to delegate to counties and municipalities the power to impose taxes for county and corporation purposes concedes the power to impose such taxes to be in the legislature; for power cannot be delegated unless possessed. In the Constitutions of several of the States are to be found provisions restricting the legislature from levying local taxes for local purposes. In the absence of such restriction, such power is plenary.

We have not been able to discover any constitutional objection to the creation of this special school district by the legislature.

In *Reelfoot Lake Levee District v. Dawson*, 97 Tenn., 151, 36 S. W., 1041, 34 L. R. A., 725, this court approved the statement of Judge Cooley to the effect that taxing districts within a State may be as numerous as the purposes for which taxes are levied. Cooley on Taxation, section 151.

In *Reelfoot Lake Levee District v. Dawson*, supra, the court was considering the validity of an act which created a levee district and conferred the power of taxation upon that district. The act was held invalid as an unauthorized attempt to delegate the taxing power, and because the taxes proposed to be levied were not equal and uniform.

The court, however, expressed the opinion that a levee district might be created by special law; that

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it was not a private corporation, and not within the constitutional prohibition that "no corporation shall be created . . . by special law." The court was further of opinion that the general assembly might by direct legislation conforming to constitutional requirements, but not by delegation of the taxing powers, provide for local assessments upon the property in a levee district for the benefit and protection of its property and inhabitants.

It has not been doubted in Tennessee since *Ballentine v. Pulaski*, 83 Tenn. (15 Lea), 633, that a tax for school purposes was a tax for the public benefit and within the taxing power. Therefore it was competent for the legislature to establish this school district in furtherance of a laudable public purpose, and to directly levy a tax for the support of the said instrumentality of the State.

In reply to the third objection to the act that it suspends general statutes for the benefit of this school district, in violation of section 8 of article 11 of the Constitution, we may observe that it has been settled by a long line of cases in Tennessee that the constitutional provision referred to does not inhibit special legislation respecting municipal corporations. *State v. Wilson*, 80 Tenn. (12 Lea), 246; *Ballentine v. Pulaski*, 83 Tenn. (15 Lea), 633; *Williams v. Nashville*, 89 Tenn., 487, 15 S. W., 364; *Redist. Cases*, 111 Tenn., 234, 80 S. W., 750; *Todtenhausen v. Knox County*, 132 Tenn., 169, 177 S. W. 487.

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This school district is not a municipal corporation under our cases in the sense that it can be authorized to impose taxes. As said of the levee district however, in *Reelfoot Lake Levee District v. Dawson*, supra, it is clearly not a private corporation. The school district is a public corporation. It is, as said of the county in *State ex rel. v. Cummings*, 130 Tenn., 566, 172 S. W., 290, L. R. A., 1915D, 274, "but an emanation from the State."

Like a municipal corporation, this school district is a mere arm or instrumentality of the government "created exclusively for public purposes, subject to the unlimited control of the legislature." *State v. Wilson*, supra.

We think the reasoning of all the cases upholding special legislation respecting towns, cities, and counties is equally applicable in support of the special legislation with respect to this school district, and, applying said reasoning to the case before us we are convinced that the statute in question does not contravene section 8, art. 11, of the Constitution.

The arguments made against the validity of this statute when analyzed reduce themselves to questions of policy, with which, this court has nothing to do. The power of the legislature is limited only by the Constitution, and when we come to search the Constitution we find no provision thereof forbidding the enactment of such law.

Some question is made in argument because the said school district includes the town of Trezevant. It is

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said that the town of Trezevant is authorized under its charter to impose a special school tax, and that the inhabitants of the town could not be burdened with a school tax imposed both by the town and by the school district, inasmuch as the inhabitants of the school district outside the town would not be equally taxed. It does not appear from the bill that the town of Trezevant has ever levied any school tax. It may never do so. It will be time enough to deal with this question when it arises.

The power of the State to assess taxes itself for municipal or local purposes is recognized in *Demo-ville v. Davidson County*, 87 Tenn., 214, 10 S. W., 353. In the late case of *Re Forked Deer Drainage District*, 133 Tenn., 684, 182 S. W., 237, a drainage district was again declared to be a governmental agency. This case following *Arnold v. Knoxville*, 115 Tenn., 195, 90 S. W., 469, 3 L. R. A. (N. S.), 469, 3 L. R. A. (N. S.), 837, 5 Ann. Cas., 881, and *State ex rel. v. Powers*, 124 Tenn., 553, 137 S. W., 1110, sustained the special assessments upon the property benefited, authorized by the act in question. The assessments involved in the case before us are not special assessments so called, but are taxes. Nevertheless, since the power to impose them was not delegated, but directly exercised by the legislature, the case in its other features is not materially different from the cases just mentioned.

The demurrer to the bill herein filed is sustained. The decree of the chancellor reversed, and the bill dismissed at complainant's cost.

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HERMAN NIEHAUS v. C. B. BARKER CONST. Co. *et al.*

(*Jackson*. April Term, 1916.)

1. MECHANICS' LIENS. Pleading. Amendment. Limitations.

In a suit to establish a mechanic's lien, complainant did not make the trustees under a prior mortgage parties before the expiration of the ninety days from the service of notice of lien. An amended bill in which the trustees were named as defendants was filed. In that bill the complainant prayed that the court determine the interest, if any, held by the trustees, and that, if the mortgage be found a valid prior lien, complainant be permitted to subject the equity of defendants to the satisfaction of his claim. Shannon's Code, section 4495, declares that at any time before trial new parties may be added. *Held* that, as no relief was sought against the trustees, the notice required by section 3536, which is a condition precedent to a mechanic securing priority over the mortgage, not having been served, the amendment will be treated as relating back to the original bill, and the trustees cannot defeat the bill on the plea of limitation. (*Post*, pp. 386-390.)

Cases cited and approved: *Lane v. Marshall*, 48 Tenn., 30; *Fulghum v. Cotton*, 74 Tenn., 596; *Blackburn v. Clarke*, 85 Tenn., 506; *King v. Patterson*, 129 Tenn., 1; *Miller v. McIntyre*, 6 Pet., 61; *Flatley v. Railroad*, 56 Tenn., 230; *Burgie v. Parks*, 79 Tenn., 84; *Love v. Railroad*, 108 Tenn., 104; *Brooks v. Brooks*, 59 Tenn., 12.

Codes cited and construed: Secs. 3536, 3540 (S.); Sec. 4495 (S.).

2. MECHANICS LIENS. Pleading. Amendment. Limitations.

In such case the contractor and mortgagor cannot defeat the lien because the trustees of the mortgage, who held the legal title, were not brought in within the ninety-day period; for, while such parties were indispensable, yet, as no relief was sought against them, limitations do not apply any more than where the contractor is not originally made a party. (*Post*, pp. 390-392.)

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Cases cited and approved: Harrison v. McCormack, 122 Cal., 651; Green v. Clifford, 94 Cal., 49; Western Sash, etc., Co. v. Helman, 65 Kan., 5; Casserly v. White, 124 Mich., 157.

Case cited and distinguished: Met. Life Ins. Co. v. People, 209 Ill., 42.

3. ATTACHMENT. Amendment of bill. Effect.

Where one seeking a mechanic's lien failed to make the trustees of a prior mortgage parties, but later brought them in by amendment, such amendment does not, under Shannon's Code, section 5237, declaring that the attachment laws shall be liberally construed, and plaintiff shall be permitted to amend any defect of form, destroy an attachment levied against the contractor and owner under the original bill. (*Post*, pp. 392-394.)

Cases cited and approved: Lillard v. Porter, 38 Tenn., 177; Watt v. Carnes, 51 Tenn., 532; Morrow v. Fossick, 71 Tenn., 129; Lookout Bank v. Susong, 90 Tenn., 590; Wilson v. Beadle, 39 Tenn., 512.

4. ATTACHMENT. Proceedings. Change in theory of attachment.

A plaintiff, who has attached a party's effects, both at law and equity, may dismiss his attachment at law and proceed in equity. (*Post*, p. 394.)

Case cited and approved: Magill v. Manson, 20 Grat. (Va.), 527.

5. MECHANICS' LIENS. Perfection of lien. Parties.

Where a prior mortgage on the premises upon which complainant sought a mechanic's lien had been discharged save as to a few mortgage bonds, the holders of which could not be discovered, and the amount of such had been deposited for payment, a mechanic's lien against the premises cannot be defeated because the trustees under the mortgage who yet held the legal title were not made parties within ninety days after serving notice as required by law; for in such cases the trustees were practically nominal parties. (*Post*, pp. 394-397.)

Cases cited and approved: Williams v. Railroad, 129 Tenn., 680; Lane v. Marshall, 48 Tenn., 30; King v. Patterson, 129 Tenn., 1;

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Gillespie v. Bradford, 15 Tenn., 168; Reid v. Bank of Tenn., 33 Tenn., 262; Alley v. Lanier, 41 Tenn., 540; Dantel & Co. v. Weaver, 73 Tenn., 392; Ragon v. Howard, 97 Tenn., 334.

FROM SHELBY

Appeal from the Chancery Court of Shelby County.
—FRANCIS FENTRESS, Chancellor.

J. W. CANADA and M. E. LESSER, for appellant.

H. H. BARKER and WILSON & ARMSTRONG, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

The Chickasaw Hotel Company let a contract to the C. B. Barker Construction Company to erect the Chisca Hotel in Memphis. The complainant was a subcontractor employed to do the plastering and metal lathing on the hotel building. The account of complainant not being paid, he gave notice as required by section 3540 of Shannon's Code, providing for the lien of mechanics or materialmen, and thereafter, within ninety days, as required by the statute, he brought an attachment suit to enforce the said lien against the Chisca Hotel property. Complainant named as defendants to his bill the C. B. Barker Construction Company, the Chickasaw Hotel Company, and the Bank of Commerce & Trust Company. The

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last-named defendant was a trustee under a subsequent mortgage, and complainant's lien was superior to the lien of this mortgage.

After some delay the C. B. Barker Construction Company filed an answer denying the claim, and the Chickasaw Hotel Company filed a plea in abatement. The plea in abatement set out that the property was covered by a previous mortgage executed when said property belonged to the Citizens' Street Railway Company. It was averred in the plea that said original mortgage had not been satisfied, and that the attachment levied under complainant's bill was void, inasmuch as the trustees under this prior mortgage, who held the legal title, had not been made parties to the proceedings. The plea in abatement was not filed until after the expiration of ninety days from the notice of lien served by the complainant upon the Chickasaw Hotel Company.

Complainant then filed an amended bill to which all the original defendants were made parties, and the trustees under the mortgage of the Citizens' Street Railway Company were likewise made defendants. It was averred in the amended bill that this old mortgage had been satisfied; that the hotel company was estopped to rely on the existence of said mortgage as a defense; but the amended bill conceded that, if the old mortgage was valid and unsatisfied, complainant's lien would be subsequent to the lien of said mortgage, and the amended bill asked that the rights of the trus-

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tees under the first mortgage be determined, and that, if it was found said mortgage was a valid prior lien, complainant be permitted to subject the equity of the hotel company to the satisfaction of his claim.

To this amended bill all the parties filed separate answers; all insisting that, inasmuch as the amended bill was not filed until more than ninety days after the statutory notice of lien was given by the complainant to the hotel company, the suit to enforce the lien was barred. The case was referred to a master, and proof taken upon the complainant's claim. The master made his report, which was slightly modified by the chancellor. The complainant was given a decree against the C. B. Barker Construction Company for the amount found by the chancellor to be due to him. The chancellor, however, was of opinion that the amended bill came too late, and that the plea in abatement was good and denied complainant's asserted lien upon the Chisca Hotel property.

The chancellor based his decree on that line of cases, which hold that the owner of the legal title as well as the owner of the equitable title must be made a party to suits in which it is sought to reach the equitable estate. *Lane v. Marshall*, 1 Heisk., 30; *Fulghum v. Cotton*, 6 Lea, 596; *Blackburn v. Clarke*, 85 Tenn., 506, 3 S. W., 505; *King v. Patterson*, 129 Tenn., 1, 164 S. W., 1191, and cases therein reviewed.

These cases will be referred to later.

Without for the present attempting to otherwise distinguish this controversy from the cases above

cited, we think they can have no application here by reason of the amendment made to the bill of complainant, by which amendment the trustees under the old mortgage of the Citizens' Street Railway Company were made parties.

The Tennessee statute with reference to the addition of new parties to a pending suit is in these words:

"At any time before trial, new plaintiffs or defendants may be added to the suit by the plaintiff, upon supplemental process taken out and served, and subject to such terms in regard to costs as the court may impose. If at the appearance term, it may be done without costs; if at any subsequent term, on such conditions as the court may prescribe, so as especially to prevent delay." Shannon's Code, section 4495.

It is true as a general rule, where new parties defendant are brought in by amendment, the statute of limitations continues to run in their favor until they are made parties; that is to say, the doctrine of relation, under which amendments are considered to have been made as of the date of the original suit, will not be applied so as to deprive any defendant of a substantial right. In other words, a defendant will not be made responsible for a proceeding of which he has had no notice. 25 Cyc., 1302; *Miller v. McIntyre*, 6 Pet., 61, 8 L. Ed., 320. See, also, *Flatley v. Railroad*, 56 Tenn. (9 Heisk.), 230.

If relief is sought against a party defendant, or if his interests are, in fact, involved, he cannot be prejudiced by the application of a fiction of the law. Such

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a defendant may successfully interpose a plea of the statute of limitations when it is sought to bring his rights into jeopardy by an amendment to an existing action.

There is, however, another class of cases where the addition of new parties merely corrects a defect in the original proceeding. In these cases the statute of limitations may not be relied on, but the amendments are held to relate back to the institution of the suit.

We have several of these cases in Tennessee. In *Burgie v. Parks*, 11 Lea (79 Tenn.), 84, an amendment was allowed by which a coexecutor was made party to a suit theretofore brought against the other executor. The amendment came more than two years and six months after the qualification of the executors, but the statute of limitations was held not to be available to the executor brought in by said amendment. Likewise, in *Love v. Railroad*, 108 Tenn., 104, 65 S. W., 475, 55 L. R. A., 471, which was a suit by the administrator of one killed in a railroad accident, without averment of statutory beneficiaries, an amendment to the declaration was allowed more than twelve months after the accident, by which the statutory beneficiaries were brought in. This amendment was likewise held to relate back and the plea of the statute overruled. To like effect see *Brooks v. Brooks*, 12 Heisk. (59 Tenn.), 12.

There is less justification for a plea of the statute of limitations here than in any of the last cases mentioned.

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This is not a case in which it is claimed the mechanic's lien had priority over the existing mortgage. There was no notice to the mortgagee or trustee, which the statute requires, in order to give precedence to the liens of the mechanics. Shannon's Code, section 3536.

The estate of the trustees could not have been affected in any way by the original proceedings, nor could it have been affected by these proceedings after the amendment. The amended bill asked that the rights of the trustees under the Citizens' Street Railway mortgage be determined, and, if it was found that said mortgage was a prior existing lien, that complainant be permitted to reach the equitable estate of the Hotel Company.

Under these circumstances we are of opinion that the trustees were not entitled to avail themselves of the limitation of ninety days prescribed by the statute for the institution of suits to fix mechanics' liens. This limitation is for the benefit of the owner of the property upon which it is sought to enforce the lien. Such limitation is not available to one against whom no relief is asked. The limitation is for the protection of property sought to be charged, not for the protection of an interest in no way involved.

We conclude therefore that the amendment by which the trustees under the old mortgage were made parties should be held to relate back to the beginning of the suits; that the trustees have no standing to invoke the ninety-day limitation, inasmuch as no relief

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can be had against them, nor can their interests be affected by the proceedings.

In so far as the Chickasaw Hotel Company and the Barker Construction Company are concerned, these parties certainly have no right to insist on any statute of limitations.

It is well settled that bringing in new parties defendant by amendment does not extend the running of the statute of limitations in favor of the original defendants. The amendment relates back in so far as the original defendants are concerned and as to them the commencement of the suit arrests the running of the statute of limitations. No advantage accrues to original defendants by the bringing in of a new defendant.

It was held in *Harrison v. McCormack*, 122 Cal., 651, 55 Pac., 592, that an amendment to a complaint against a partnership which brings in an additional member of the firm not originally joined, while subject to the defense of the statute of limitations by the new defendant, does not change the action or introduce a new cause of action as to the original defendants nor let in the statute in their behalf.

In *Metropolitan Life Ins. Co. v. People*, 209 Ill., 42, 70 N. E., 643, it was held that there was no new cause of action brought in by an amendment which substitutes one party for another so far as the original party was concerned.

“Bringing in new parties defendant by amendment does not extend the running of the statute of limita-

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tions in favor of the original defendants to the time of the amendment. As to them the commencement of the suit is the period at which the running of the statute is arrested." 25 Cyc., 1303.

See, also, cases collected in note 3 L. R. A. (N. S.), 306, and note 55, 25 Cyc., 1303.

It has been held in a number of cases that the general contractor, who is a necessary party, may be brought in by amendment after the expiration of the statutory period in which suit to enforce the lien of a materialman or subcontractor must be brought. This is so because the general contractor is not the party against whom the lien is to be enforced, and is not interested in that phase of the litigation. *Green v. Clifford*, 94 Cal., 49, 29 Pac., 331; *Western Sash, etc., Co. v. Heiman*, 65 Kan., 5, 68 Pac., 1080; *Cas-serly v. Waite*, 124 Mich., 157, 82 N. W., 841, 83 Am. St. Rep., 320. And see other cases collected in note 81, 27 Cyc., 344.

These cases are analogous to the cases under consideration, and their reasoning is applicable. The trustees under the mortgage of the Citizens' Street Railway Company are no more interested in the enforcement of this lien than a general contractor would be.

Inasmuch, therefore, as none of the parties defendant are entitled to set up the plea of the statutory period of limitations prescribed for mechanic's lien suits, as against the amended bill, it follows that the amendment must be held to relate back to the com-

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mencement of the original suit. As amended by the addition of the new parties, these proceedings conform to all the requirements insisted on by the defendants.

We cannot agree that the attachment herein levied under the original bill can be treated as void in view of the amendment made to that bill.

Our statute provides that:

“The attachment law shall be liberally construed, and the plaintiff, before or during trial, shall be permitted to amend any defect of form in the affidavit, bond, attachment, or other proceedings; and no attachment shall be dismissed for any defect in, or want of, bond, if the plaintiff, his agent or attorney, will substitute a sufficient bond.” Shannon’s Code, section 5237.

There is no question in this case of any intervening attachments—attachments levied by others between the original bill and the amended bill. As seen before, no claim can be asserted against the interests of the new defendants. *Lillard v. Porter*, 38 Tenn. (2 Head), 177, *Watt v. Carnes*, 51 Tenn. (4 Heisk.), 532, and such cases are not in point.

The general rule as stated in Ruling Case Law with reference to amendments in attachment proceedings is as follows:

“Under the liberal statutes in force in many states the plaintiff will be allowed to correct defects and irregularities by amendment of the declaration or complaint. Defects in parties or a variance between

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the names of the parties as stated in the attachment and the declaration or complaint may be cured in this manner. And defects in the form of declaring obviously may be cured by amendment, and neither subsequently attaching creditors nor bail can take advantage thereof. So an amendment changing the form of the action, merely, or adding a new count for the same, will not dissolve the attachment. Nor will the attachment be dissolved by an amendment which merely sets the cause forth with greater detail." 2 R. C. L., p. 851.

The original bill in this case sought to subject to complainant's debt the interest of the hotel company in the land attached upon the supposition that the hotel company owned the entire estate therein at the time complainant's lien accrued. The object of the amended bill was the same, but, inasmuch as part of the estate was asserted to be in the trustees of the old mortgage, the complainant asked that the rights of such trustees, the new defendants, be determined, and that the real interest of the hotel company, whatever it was, should be subjected to his claim.

Such an amendment is permissible, and does not affect the validity of the attachment nor the lien of the complainant. *Morrow v. Fossick*, 71 Tenn. (3 Lea), 129, is quite in point. In that case an attachment was levied on the property of a nonresident, and a plea in abatement was filed setting out that the property attached belonged to a firm of which the original defendant was a member, and not to the orig-

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inal defendant himself. The bill was then amended so as to reach the interest of the original defendant in the firm and the other members of the firm were made parties. This amendment was permitted by the court. The court held the property taken under the original attachment and proceeded to determine the rights of the parties.

To like effect see *Lookout Bank v. Susong*, 90 Tenn., 590, 18 S. W., 389; *Wilson v. Beadle*, 39 Tenn., (2 Head), 512.

The Chisca Hotel property was brought before the court by the attachment levy, and the complainant's amendment amounts to a mere release of his asserted lien thereupon, in so far as the title of the trustees is concerned. A plaintiff who has attached a defendant's effects, both at law and in equity, may be allowed to dismiss his attachment at law and proceed in equity. *Magill v. Manson*, 20 Grat. (Va.), 527.

The defense made to the lien asserted for the complainant is extremely technical. It has often been said in Tennessee that the mechanic's lien statutes are to be liberally construed, and that technical niceties of construction will not be allowed to defeat their purpose. *Williams v. Railroad*, 129 Tenn., 680, 688, 168 S. W., 160, and cases therein cited.

The rules announced in *Lane v. Marshall*, 48 Tenn. (1 Heisk.), 30, that the equitable interest in land cannot be reached unless the holder of the legal title is made a party to the proceedings, and that proceedings against the equitable title, in the absence of the

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holder of the legal title, are ineffective, have been adopted in many of our cases. These cases are reviewed in *King v. Patterson*, 129 Tenn., 1, 164 S. W., 1191, and these rules again applied. These principles are too firmly embedded in our jurisprudence at this time to be shaken. However, none of the cases have involved the claims of mechanics asserting their statutory liens.

In this case it appears that the old trust deed executed by the Citizens' Street Railway Company has matured. All bonds have been paid off which were secured by this mortgage, except a few that cannot be located. Funds have been deposited in a New York bank to pay these scattering bonds outstanding, and advertisement has been made for the holders thereof. Several years ago the Memphis Street Railway took over the properties of the Citizens' Street Railway Company and assumed the indebtedness of the latter concern. The Memphis Street Railway made arrangements with the Central Trust Company of New York to take care of the bonds of the Citizens' Street Railway and collateral was deposited with the trust company to protect the bonds of the Citizens' Street Railway. So for a long while the bondholders of the Citizens' Street Railway Company secured by this old mortgage have been protected. For years such bondholders have had no real interest in this particular piece of realty involved in this suit. True, the trustees under the old mortgage held the legal title to secure the payment of the old bonds until all of said

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bonds were satisfied, but, as a matter of fact, said bonds have been protected and arrangements perfected for their satisfaction long since.

Under such circumstances it would be highly inequitable to repel this lien claimant because of his original failure to name as defendants to his suit representatives of those having so little interest in the property sought to be charged. As a matter of fact, such defendants were little more than nominal defendants.

For the reasons stated, we are of opinion that the chancellor's decree, in so far as he denied complainant's lien, was erroneous. In that respect the decree will be reversed. There is no exception taken here to the amount found to be due the complainant. The cause will be remanded to the end that proper steps may be had for the enforcement of the complainant's lien.

There is no doubt but that an equitable estate may be subjected to a mechanic's lien, nor that the owner of such estate is the owner upon whom the statutory notice should be served by the subcontractor, when it is sought to charge the equity. *Gillespie v. Bradford*, 15 Tenn. (7 Yerg.), 168, 27 Am. Dec., 494; *Reid v. Bank of Tenn.*, 33 Tenn. (1 Sneed), 262; *Alley v. Lanier*, 41 Tenn. (1 Cold.), 540; *Daniel & Co. v. Weaver*, 73 Tenn. (5 Lea), 392; *Ragon v. Howard*, 97 Tenn., 334, 37 S. W., 136.

The levy is upon the same land, whether the equity or legal title be attached. The levy made, taken in

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connection with the contents of the amended bill, and applying the doctrine of relation, is a valid levy upon the equitable interest of the Chickasaw Hotel Company in the property described.

The costs of appeal will be paid by defendants. .
Costs below will be taxed by the chancellor.

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MRS. NELL SMITH v. BANK OF COMMERCE & TRUST CO.

(*Jackson*. April Term, 1916.)

1. **MASTER AND SERVANT. Injuries to third persons. Independent contractor.**

The employer is liable for the negligence of an independent contractor or his employees where he might have anticipated the injury as a direct or probable consequence of the failure to exercise reasonable care in the course of the work. (*Post*, pp. 405, 406.)

Case cited and distinguished: *McHarge v. Newcomer*, 117 Tenn., 604.

2. **MASTER AND SERVANT. Injuries to third persons. Independent contractor.**

Where plaintiff while walking on street outside of covered sidewalk was struck by a hot rivet which was dropped by an employee of an independent contractor constructing a building, the owner of such building was not liable, the negligent act being only an incidental or collateral detail of the work and not a necessary or natural result which the owner might reasonably have anticipated. (*Post*, pp. 406-412.)

Cases cited and approved: *Hundhausen v. Bond*, 36 Wis., 29; *Hackett v. W. U. Tel. Co.*, 80 Wis., 187; *McHarge v. Newcomer*, 117 Tenn., 595; *Strauss v. Louisville* (1900), 108 Ky., 155; *Pye v. Faxon* (1892), 156 Mass., 471.

Cases cited and distinguished: *Anderson v. Fleming*, 160 Ind., 597; *Boomer v. Wilbur* (1900), 176 Mass., 482; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis., 360; *Richmond v. Sitterding*, 101 Va., 354; *Sallotte v. King Bridge Co.*, 65 L. R. A., 620.

3. **MASTER AND SERVANT. Injuries to third persons. Independent contractor.**

That the owner of a building in process of construction required

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an independent bond from the contractor, does not in any way render the owner liable for negligence of the contractor. (*Post*, pp. 412, 413.)

Cases cited and approved: *French v. Vix* (1894), 143 N. Y., 90; *Wolf v. American Tract Soc.* (1898), 25 App. Div., 98; *Salliotte v. King Bridge Co.*, 122 Fed., 378.

Case cited and distinguished: *Central Coal & I. Co. v. Grider*, 65 L. R. A., 506.

FROM SHELBY

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—J. P. YOUNG, Judge.

H. H. BONNER and BELL, TERRY & BELL, for plaintiff in error.

R. P. CARY and WM. M. HALL, for defendant in error.

MR. GHOLSON, Special Judge, delivered the opinion of the Court.

This suit was brought by the plaintiff, Mrs. Nell Smith, against the Consolidatd Engineering Company, the E. W. Minter Company, and the Bank of Commerce & Trust Company, hereinafter called the bank, for damages sustained by her on May 9, 1913, while on the street in front of a building that was being

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erected for the bank. On March 20, 1913, a contract was made between the said engineering company and the bank, as owner, by which the former agreed to construct an annex for the latter and to repair and remodel the old building, on the lot of said bank in the city of Memphis. The defendant engineering company sublet to the defendant E. W. Minter Company a portion of the construction work. The new building was to be fifteen stories high and to be erected on the north side of and adjoining the large bank and office building then owned and occupied by the defendant bank. It was on the most traveled business street in the city of Memphis. Section 9 of said contract is as follows:

“The contractor will, at his own expense, protect, in a suitable manner, the work and ground, so as to avoid any injury to the property of adjacent owners or of others and damage to their persons or employees or any other persons. The contractor will be responsible for all damage of every nature whatsoever done to persons or property during the progress of the work, and occasioned by its own acts or neglect, or that of any of its subcontractors, foremen, laborers or other employees or agents, and shall have executed and maintained in force bonds as provided in the specifications.

“Should there be any unsatisfied claims for damages to persons or property at the time when final estimate for doing the work is made and returned, the owner shall have the right to retain an amount

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sufficient to cover any such claims for its own indemnity until the same have been fully disposed of or adjusted by the contractor.”

Another provision of the contract was that the work should be done under the personal supervision of the contractor and the contract should not be assigned, without the consent of the owner; and should any portion of the work be let to subcontractors the contractor covenanted that such subcontractors should be responsible, capable, and reputable persons, and the contractor should remain responsible for the performance of the work, notwithstanding any subcontract.

It was agreed that the defendant E. W. Minter Company did all the steel framework under said contract. Therefore the act which caused the injury to plaintiff was that of the said E. W. Minter Company, or some of its employees.

A shed, ten or fifteen feet wide, covered with heavy solid timber, was erected extending entirely over the sidewalk, all the way in front of the building that was in process of erection. The plaintiff had previously passed under this shed nearly every day. On May 9, 1913, while she was walking on the street in front of the building, and not under the shed, she was struck on the head by a red hot bolt or rivet, severely, and apparently, permanently injured, from which she has suffered great pain.

The declaration, among other things, averred that while said engineering company and said Minter Com-

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pany were engaged in erecting the steel framework of the building, it was their habit and custom to have the bolts or rivets heated to a red or white heat, and thrown by one employee of said defendants to another employee, who was expected to catch them in a bucket or receptacle, and then to be used. That said work, and the manner in which it was done, was unusual, extremely and intrinsically dangerous to pedestrians on the street below; that the defendants failed to take necessary and reasonable precautions to prevent accidents; that the manner of doing the work was exceedingly dangerous; and that it was the duty of the bank as owner to protect the traveling public from injury by reason thereof. The declaration does not contain any specific averment that the bank knew of the alleged dangerous manner in which this work was being conducted, nor wherein or how it had failed to take the necessary precautions, or was derelict, or what could have been done that was not actually done.

Said engineering company and the bank filed a joint plea of the general issue, and the E. W. Minter Company filed two pleas consisting of the general issue and contributory negligence.

On February 20, 1914, the action was dismissed as to the Minter Company. It seems that plaintiff settled with the latter under a contract with covenants not to sue. On February 25, 1914, a verdict was ren-

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dered in favor of the Consolidated Engineering Company upon its motion for peremptory instructions. There was no exception taken by the plaintiff to this. There was a mistrial as to the defendant bank. Upon the second trial peremptory instructions were given by the court in favor of the bank, to which the plaintiff excepted, prayed, and was granted an appeal to the court of civil appeals. That court, in a well-considered and able opinion by Mr. Justice Moore, affirmed the action of the circuit judge. The petition for *certiorari* was heretofore granted. It was argued and able and elaborate briefs have been filed for both sides.

It is seriously and earnestly insisted by counsel for the plaintiff that the bank as owner of the property is liable, and that it was error in the court of civil appeals in not reversing and remanding the case. The several assignments of error in substance are, that the erection of this high building upon the most populous, most used, and most important business street in the city of Memphis, immediately abutting and adjoining the sidewalk, was intrinsically dangerous to users of the highway unless due care to prevent injury was used, and that it was the duty of the bank, to the public, as the owner of the property, to have the work done in a cautious, careful, and prudent manner, to minimize as much as possible the inconvenience, annoyance, and danger, and this duty it could not delegate to an independent contractor so as to relieve itself of liability.

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It appears that on the day plaintiff was injured, the steel framework of the new building was up to the eleventh or twelfth floor; that two or three men at a little forge would heat the rivets to a red or white heat, and by means of a pair of tongs would throw them to a man with an air hammer, and the latter would catch them in a bucket; they would throw rivets from five to possibly twenty-five feet. The rivets were then being heated on the eighth floor and the man catching them was on the sixth or seventh floor at the northwest corner. The forge was situated back from the front about twenty-five feet, near the middle of the building, which was twenty-five or thirty feet wide. They would use an ordinary tin bucket in catching the rivets, putting a piece of wood in the bottom of the bucket about three inches wide to stop the rivets and to keep the bottom of the bucket from being knocked out. Sometimes a rivet would strike the tin in the bottom of the bucket and bounce out. Sometimes the bucket would be old and the rivets would go through it, and sometimes the man with the bucket would miss the rivets. The witness who detailed this method of handling the rivets stated that on the afternoon plaintiff was hurt he noticed that the man, who was catching the rivets in the bucket, missed one of them and it fell down in the street; that he afterwards looked out of the front window and saw a great crowd gathering in the street; that before he got down there, the lady, who was evidently the plaintiff, was carried to the

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elevator and taken to a doctor's office. While this witness did not state that this method of handling the rivets was usual and customary, yet it is fairly inferable from his testimony. It is not shown that at any other time had a rivet gone into the street or had even fallen outside the walls of the building in front and upon the covering over the sidewalk. It is not controverted that the instance detailed above, when the man failed to catch the rivet and it went out into the street, was the occasion when the plaintiff was injured.

It is not disputed that the E. W. Minter Company was an independent contractor at the time the injury to plaintiff occurred. But it is insisted that the rule to be applied comes within one of the exceptions, and therefore the employer is liable.

While the general rule of law is that the proprietor or employer is not liable for the negligence of his contractor and the servants and assistants of the latter, yet there are well-established exceptions and limitations to it.

In the case of *McHarge v. Newcomer*, 117 Tenn., at page 604, 100 S. W., 702, 9 L. R. A. (N. S.), 298, these exceptions in general are:

"Where the act contracted to be done is wrongful or tortious in itself; where the injury is the direct or necessary consequence of the work to be done; where the thing to be done or the manner of its execution involves a duty to the public incumbent upon the proprietor or employer; when the work contracted

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for is intrinsically dangerous, and the performance of the contract will probably result in injury to third persons or the public; and where the proprietor interferes with the contractor in the performance of the work.”

We think Mr. Justice Moore, of the court of civil appeals, in his opinion in this case, stated the rule to be applied in this case correctly, as follows:

“If an injury might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of the employment, then in every such case the owner, or the person having the work performed, is liable for an injury sustained during its execution or performance.

“That is, if the owner of a lot contracts with another to erect a building upon it, and if such owner at the time of the execution or the making of such contract might have anticipated, or foreseen, that an injury would result to third persons properly and lawfully upon the streets or sidewalks adjacent to the building, as a direct and probable consequence of the performance of work on the building, if reasonable care was not taken to avoid such injury, then the owner in such case is liable for such injury, and he must see that reasonable and proper care is used to prevent an injury to persons lawfully upon the streets adjacent to the building being erected.”

We find in the case of *Anderson v. Fleming*, 160 Ind., 597, 67 N. E., 443, 66 L. R. A., 119, a quotation

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approving the text of Dillon on Municipal Corporations, in discussing the duty of such a corporation to maintain its streets in a safe condition for public travel, the following:

“But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case the immediate author of the injury is alone liable.”

In the case of *Boomer v. Wilbur* (1900), 176 Mass., 482, 57 N. E., 1004, 53 L. R. A., 172, the injury was caused by a brick, which a mason employed to repair a chimney, let fall in the street and the plaintiff was injured thereby. The defendant owner employed a contractor to repair chimneys on his building adjoining a highway. The contractor was an independent one, but the plaintiff invoked the same exception to the general rule of nonliability in such cases as is relied upon by the plaintiff here. Judge Hammond, in delivering the opinion in that case, among other things, said:

“The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. It is plain that unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveler.

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. . . This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public. The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held."

In the case of *Smith v. Milwaukee Builders' & Traders' Exchange*, Wisconsin Supreme Court, reported in 91 Wis., 360, 64 N. W., 1041, 30 L. R. A., 504, 51 Am. St. Rep., 912, where the work was being done by an independent contractor, the plaintiff was hit on the head by a falling brick and severely injured. The court said:

"It is evident that the falling of the brick was collateral to the contract, which was, if negligence at all, the result of negligent acts on the part of some of the workmen employed by the contractors, and was not the necessary or natural result of any act which the contractors were employed to do. In this

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situation the owner is not liable, at least in the absence of some other distinct ground of liability—citing *Hundhausen v. Bond*, 36 Wis., 29; *Hackett v. W. U. Telegraph Co.*, 80 Wis., 187, 49 N. W., 822.”

In the last case cited, however, the owner was held liable because of the violation of an ordinance which required the owner or contractor, before erecting any building abutting on a public sidewalk, to cause a roof passageway to be built in front of the building upon the sidewalk, under pain of a certain fine or imprisonment.

It clearly appears that in the instant case a roofed passageway had been erected to protect the traveling public just as required by the municipal ordinance referred to in the Wisconsin case supra. This is pertinent to show that such precautions had been taken as were deemed reasonable by the city authorities who passed that ordinance, notwithstanding none is shown to have been required by the city of Memphis.

In the case of *Richmond v. Sitterding*, 101 Va., 354, 43 S. E., 562, 65 L. R. A. 445, 99 Am. St. Rep., 879, it was said:

“It cannot be successfully maintained that building a house on a lot abutting upon a street is inherently and necessarily dangerous, or that danger and hazard must necessarily attend its erection. It is a lawful work, and of necessity engaged in by thousands every day, and, if, carefully and properly done involves no danger to any one. The negligence of the employees of the brick contractor in leaving their

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plank walkway extended upon the sidewalk after night was not a necessary incident of the work, or even to be anticipated by any one. . . . The erection of buildings adjacent to a highway, with the usual and necessary excavations, and the consequent obstructions to the sidewalk and street, is held not to be within the exception to the general rule, which attaches liability to employers where the work in hand is inherently dangerous, or will necessarily create a nuisance."

The case under consideration is different from that of *McHarge v. Newcomer*, 117 Tenn., 595, 100 S. W., 700, 9 L. R. A. (N. S.), 298, for in that case an awning over a public street in front of the building owned by the defendant, was being repaired and no precautions were taken to prevent portions of the awning, material, or tools from falling on those below. The work being done for the bank in this case was on its own lot. Anything that would have fallen within the walls of the building would necessarily have been upon the property of the defendant bank, where none but those employed in the construction of the building had the right to be, and, as heretofore shown, the public were protected by a shed all the way over the sidewalk, and this shed was covered over with heavy solid timber. It was argued, and we think successfully, that the city authorities would not have permitted the entire street to have been covered. Indeed, it appears not to have been necessary at any other time than on the occasion when plaintiff was injured.

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There is an exhaustive note on the subject of the liability of the employer of an independent contractor, under the case of *Salliotte v. King Bridge Co.*, 65 L. R. A., 620, at pages 643 and 644, under the head of "Work on Buildings," where a number of cases that are pertinent are collated. Among them we quote:

"The right to maintain an action was also denied, where a person walking along the street was injured by the negligence of a servant of a contractor, who threw a piece of lime into a mortar bed in the street. *Strauss v. Louisville* (1900), 108 Ky., 155, 55 S. W., 1075. . . .

"A jury is properly charged that one for whom a brick wall is being erected is not liable for damages sustained by the adjoining owner by the dropping of brick and mortar on his premises, if such occurrences were not necessarily involved in the building of the wall, but were due to the negligence of the contractor or his servants." *Pye v. Faxon* (1892), 156 Mass., 471, 31 N. E., 640."

There was a concurrent finding of the trial judge and the court of civil appeals that the defendant bank did not know of the alleged dangerous method of handling the rivets. The plaintiff neither alleged nor proved what precautions could have been taken that would have prevented the injury. It is urged that the rivets should not have been thrown and caught in the manner shown; that they were liable to be missed in catching and fall into the street. Yet plaintiff has failed to prove that a single rivet had ever

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previously fallen into the street, or in such a manner as would likely endanger one using the street. How could the owner be held to have anticipated what had never happened before? The negligence complained of was but a mere detail of the work that could not have been foreseen or forestalled by the owner. It did not necessarily follow the execution of the work contracted for. It was not a necessary detail of the work.

We think Judge Moore has been done an injustice in the copying of his opinion where he is purported to have said that this was merely one of the details necessary to be performed in the execution of this contract. We think that he intended to say not necessary, because this statement is not in accord with the remainder of his opinion.

It was insisted by learned counsel for the plaintiff that the bank realized that the work was intrinsically dangerous because it took a bond from the engineering company for the faithful performance of the work and to protect it from the results of injuries to other persons, and for that reason it should be held liable. This does not in any way affect the liability. We quote the following, appearing on page 506 of 65 L. R. A., under the annotated case of *Central Coal & I. Co. v. Grider*:

“It is well settled that the fact of the contractor’s having undertaken, as between himself and the employer, to be responsible for injuries occasioned by any tortious conduct, on the part of himself and his

servants, does not in any way affect or qualify the position of third parties in regard to the recovery of damages from the employer. Such a stipulation inures to the benefit of the employer alone, and confers no right of action upon any one else. *French v. Vix* (1894), 143 N. Y., 90, 37 N. E., 612; *Wolf v. American Tract Soc.* (1898), 25 App. Div., 98, 49 N. Y. Supp., 236."

See also, *Salliotte v. King Bridge Co.*, 122 Fed., 378, 58 C. C. A., 466, 65 L. R. A., 620, an opinion by Judge Lurton.

We are clearly of opinion that the circuit judge and the court of civil appeals were correct and the writ of *certiorari* having heretofore been granted, the action of said courts is in all things affirmed.

Keyer v. Memphis Cotton Exchange.

MARY A. KEYER v. MEMPHIS COTTON EXCHANGE *et al.*

(Jackson. April Term, 1916.)

1. EXCHANGES. Property in seat. Right to compel transfer.

Where the charter of a cotton exchange expressly provided that its members were not stockholders, the rule that a purchaser of stock may compel, by a bill in equity, the transfer of the same on the books of the corporation, and that a corporation must issue a certificate of stock to one entitled to it, does not apply to the sale of a seat in the exchange. (*Post*, pp. 421-424.)

Cases cited and approved: *State of Minn. v. McPhail*, 124 Minn., 398; *Hyde v. Woods*, 94 U. S., 523; *Sparhawk v. Yerkes*, 142 U. S., 1; *O'Dell v. Boyden*, 150 Fed., 731; *Zell v. Baltimore Stock Ex.*, 102 Md., 489.

Cases cited and distinguished: *Vaughn v. Herndon*, 91 Tenn., 65; *ReGregory*, 98 C. C. A., 383.

2. EXCHANGES. Transfer of memberships.

Where a provision of the constitution and by-laws of a cotton exchange was that "every member, upon admission, pledges himself to abide by the constitution and also by all the by-laws, rules, and regulations of the Exchange," a provision of the the constitution that no certificate of membership shall be transferred until the intention is posted for ten days and until all claims presented by other members within the ten days are settled was binding upon all members, and cannot be complained of by a third party. (*Post*, pp. 424, 425.)

Case cited and approved: *Ryan v. Cudahy*, 157 Ill., 108.

FROM SHELBY

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the

Keyer v. Memphis Cotton Exchange.

Court of Civil Appeals from the Supreme Court.—F.
H. HEISKELL, Chancellor.

BOYD & BEJACH, for complainant.

J. W. CANADA and EVANS & McCADDAN, for defendant.

MR. GHOLSON, Special Judge, delivered the opinion of the Court.

The husband of complainant was a member of the Memphis Cotton Exchange and held a certificate of membership. This he bequeathed to complainant by will, and after his death she rented or leased the membership to several parties. In each instance the certificate was regularly indorsed, transferred on the books of the Exchange, and a new certificate issued to the lessee, enabling him to avail himself of all the rights and privileges of a member of said Exchange. On August 28, 1911, she leased it to Eugene H. Carter for one year, a certificate was duly issued to him, which he on the same day transferred on the back thereof to her, and she actually held it thereafter, although it stood, and still is, in Carter's name on the books of the Exchange. She renewed the lease to Carter for another year, without further assignment, transfer or other certificate, so that his right to use said membership, so far as she is concerned, expired August 28, 1913. The said certificate of membership issued to Carter, and his assignment thereof to complainant, are as follows:

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“No. 605.

“Memphis Cotton Exchange Certificate of Membership.

“This certifies that Eugene H. Carter is a member of the Memphis Cotton Exchange, of Memphis, Tenn., in full and regular standing at the date hereof. This membership is subject to annual dues and is transferable on the books of the Exchange as provided by the constitution and by-laws.

“Witness the corporate seal and signatures of the president and secretary at Memphis, Tenn., this 28th day of August A. D. 1911.

“John Sneed Williams, President.

“Henry Hotter, Secretary.

Indorsement:

“For value received, I hereby transfer the within-named certificate of membership in the Memphis Cotton Exchange of Memphis, Tennessee, to Mrs. Mary A. Keyer, subject to the constitution and by-laws of said Memphis Cotton Exchange. Eugene H. Carter.

“Dated August 28th, 1911.

“Witness: H. R. Boyd.”

Carter was thereupon duly enrolled upon the books of the Exchange as a member, and thereafter exercised all the rights and privileges of a member and transacted business on the floor of the Exchange with other members in the regular way, in accordance with the constitution, by-laws, rules and regulations of the Exchange, until this controversy arose.

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During the time said membership was rented said Carter gave complainant an indemnity bond guaranteeing her against loss resulting from the rights of other members against her certificate while it stood in his name.

Complainant applied for election as a member of said Exchange, and on November 26, 1913, was duly elected and since has paid all dues and assessments charged against such membership. It appears that while one might be elected a member before having a certificate, yet he could not transact business on the floor of the Exchange, nor was he entitled to all the privileges of membership, until a certificate of membership was issued to him. She requested said Exchange, through its proper officials, to issue her a certificate of membership. Upon this request the said Exchange gave notice, posted on its bulletin board, that Carter intended to transfer his certificate of membership in the Exchange.

Within the ten days as presented by said notice, Battle M. Brown & Co., members of said Exchange, gave due notice to its officers that said Carter was indebted to them in the sum of \$3744.47, with interest, on account of a purchase and delivery of cotton from them in January, 1912, on which he paid one-half, gave his check on a Memphis bank for the other half, payment of which being declined it was protested and had never been paid.

Thereupon the Exchange declined to reissue the certificate standing in the name of Carter to the com-

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plainant, until he paid to said Battle M. Brown & Co. the above indebtedness. This refusal was under a provision of the constitution of said Exchange, which is as follows:

"Sec. 2. A certificate of membership may be transferred to a member or a member-elect, but to no other person, by a surrender thereof to the secretary of the Exchange, together with a duly executed assignment thereof, and a fee of \$25 for transferring the certificate, whereupon the secretary shall issue a new certificate of membership to the member, a member-elect, mentioned in said assignment. But no certificate of membership shall be so transferred until a notice of the intention to make such transfer, subscribed by the member owning the certificate, shall be posted upon the bulletin of the Exchange for ten days, and until all claims against such member which may be presented within said ten days, by other members of the Exchange, shall be settled; or while any dues on such membership shall remain unpaid. The executors or administrators of the deceased member may transfer their decedent's certificate as herein provided."

The complainant then filed her bill in this cause asking for a mandatory injunction to compel the said Exchange, through its proper officers, to issue her a certificate of membership in lieu of the one standing on its books in the name of said Carter.

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The Memphis Cotton Exchange was organized in 1874, under charter granted by the chancery court. Thereafter, in 1889, it obtained a charter under the general incorporation laws of Tennessee, under which it has since done business. The purposes as stated in the charter are:

“To purchase or provide, regulate and maintain a suitable building, room or rooms, for a ‘Cotton Exchange’ in the city of Memphis; to adjust controversies between the members, and to appoint a board of arbitration to adjudicate upon such controversies; to establish just and equitable principles in the trade; to maintain uniformity in its rules, regulations and usages; to adopt standards of classification; to acquire, preserve and disseminate useful information connected with the cotton interests throughout all markets; to decrease the local risks attendant upon the business, and generally to promote the cotton trade of the city of Memphis, increase its amount and augment the facilities with which it may be conducted. . . .

“The general welfare of society, not individual profit, is the object for which this charter is granted, and hence the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members.”

The said Exchange has a constitution and by-laws for the transaction of business, providing for election of certain officers, admission of members, the number of which is limited to one hundred and seventy-five

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initiation fees, transfer of certificates of membership, annual dues, certain committees, and prescribing their duties, etc., being such as are usual with produce exchanges. Among others is the one quoted above, and there is a further provision that:

“Every member, upon admission, pledges himself to abide by the constitution, and also by all by-laws, rules, and regulations of the Exchange.”

The constitution also provides for the expulsion of a member for, among other things, fraudulent breach of contract, or of any proceeding inconsistent with just and equitable principles of trade, or of other misconduct.

It is shown to have been the uniform custom of the Exchange, acting under the rule quoted above, to post on its bulletin board for ten days a notice of the proposed transfer, and not to transfer a certificate of membership until the member, in whose name it stood on the books of the corporation, paid all claims and debts due from him to another member of the Exchange. This rule applied to all members. That in some instances it was personally known that memberships were leased or rented, yet the lessee or renter appeared on the books of the Exchange as a regular member, and to all intents and purposes was such as between him and the corporation.

The Exchange does an average annual business in spot cotton estimated at \$33,000,000. The last sale of a membership was for the price of \$2500.

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The theory of the bill is that a membership in said Exchange is a share of stock and property, and not merely membership subject to forfeiture; that having been duly elected a member and tendered the certificate of membership transferred to her by Carter, together with the required transfer fee, a court of equity will order the proper officers of the Exchange to issue to her a certificate in her name in place of the one tendered by her standing in the name of Carter.

The Exchange relies upon the validity of the provision of its constitution quoted above and declines to issue a certificate of membership until Carter has paid his indebtedness to Battle M. Brown & Co. The validity of the provision of said constitution is not attacked by the bill, and it is not contended that it is unreasonable. It is insisted, however, by the complainant, that in refusing to make the transfer and issue a certificate of membership, the Exchange is attempting to enforce a lien on a membership in it in favor of another member. It is further insisted that even if the Exchange had a right to refuse to transfer to her the certificate of membership involved in this suit, it had waived that right and estopped itself to set up same.

The authorities cited by learned counsel for complainant supporting the position that a purchaser of stock may compel, by bill in equity, the transfer of same on the books of the corporation, and that a corporation must issue a certificate of stock to one entitled to it, do not apply here.

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The complainant is confronted in the beginning with the proposition that, by its charter, "this is a corporation for general welfare and not for profit; that the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members."

This court has held in the case of *Vaughn v. Herndon*, 91 Tenn., 65, 17 S. W., 793, where the Clarksville Tobacco Board of Trade was chartered under the same statute as the Memphis Cotton Exchange, that the provision of the charter and the by-laws thereunder are wise legislation, and will operate to prevent much needless and expensive litigation, as well as promote the welfare of commerce, if correctly enforced.

"A seat in an exchange, for some purposes and in some aspects, is regarded as property, while for other purposes it may be regarded otherwise. Although a seat in an exchange is something more than a mere personal license or privilege, it is not property in the concrete or in the broad sense of that term. It is, however, a thing of value, often of very considerable value, and consequently in this specific and peculiar sense it is regarded as property, and especially is this true since it is capable of being reduced to possession and transferred. It has been held that the contingency of the refusal of an exchange to approve of the transfer of a seat therein affects its value but not the property in such seat. Some courts without qualification have declared the seat to be property; and though its sale and transfer be clogged with

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onerous conditions, and the property be of a narrow character, these conditions and characteristics, it has been held, go only to the reduction of the pecuniary market value, and do not deprive it of its character as property." 10 Ruling Case Law, 1206, and authorities cited.

A seat in an exchange has generally been held as an asset in bankruptcy, and may be disposed of by the member's trustee in bankruptcy; and in some jurisdictions it has been held subject to a judgment creditor in proper proceedings. 10 Ruling Case Law, pp. 1208 and 1209.

In Minnesota it has been held that a membership in a board of trade was property and might be taxed.

See the annotated case of *State of Minn. v. Mcphail*, 124 Minn., 398, 145 N. W., 108, 50 L. R. A. (N. S.), 255, Ann. Cas., 1915C, 538.

In *Re Gregory* it was held that funds arising from the closing out of the transactions upon its floor of a bankrupt member of a stock exchange pass into the hands of the bankruptcy trustee, subject to the rules of the exchange, which give it and its members priority over other creditors. See Annotated case *Re Gregory*, 98 C. C. A., 383, 174 Fed., 629, 27 L. R. A. (N. S.), 613, and authorities cited.

"The right of the member to transfer or assign his seat not being an absolute one, but incumbered or clogged by such conditions not contrary to law, as the the Exchange shall see fit to impose thereon, a rule of the Exchange which in effect gives other members of

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the Exchange to whom a bankrupt member is indebted on account of transactions on the Exchange, a preference in the proceeds of the sale of the seat, is valid, and the trustee in bankruptcy necessarily takes subject thereto; nor is such preference an unlawful one, within the provisions of the bankruptcy act. *Hyde v. Woods*, 94 U. S., 523, 24 L. Ed., 264; *Sparhawk v. Yerkes*, 142 U. S., 1, 12 Sup. Ct., 104, 35 L. Ed., 915." Note on page 616 of 27 L. R. A. (N. S.).

Also see *O'Dell v. Boyden*, 150 Fed., 731, 80 C. C. A., 397, 10 Ann. Cas., 239—opinion by Judge Lurton.

The case of *Zell v. Baltimore Stock Ex.*, 102 Md., 489, 62 Atl., 808, 4 L. R. A. (N. S.), 435, was where it was held that one who furnished his partner the money to purchase a seat on the Baltimore Stock Exchange has no equity to prevent the enforcement of a rule of the Exchange that a seat may be sold for the debts of the member holding it, in favor of other members, notwithstanding knowledge on the part of officers of the Exchange of the facts.

The court in this case held that there was no want of harmony in the authorities as to the validity and contractual effect of the rules and regulations of a voluntary association, the one in question; i. e., the Baltimore Stock Exchange.

It will be seen from the foregoing authorities that full force and effect are given by courts to the constitution and by-laws of exchanges and boards of trade, where reasonable. It appears that one of the pro-

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visions of the constitution and by-laws of the Memphis Cotton Exchange was that:

“Every member, upon admission, pledges himself to abide by the constitution, and also by all the by-laws, rules and regulations of the Exchange.”

The provision relied upon as a defense in this case being in force, it was binding upon all its members, and outsiders had no right to complain of it. See annotated case of *Ryan v. Cudahy*, 157 Ill., 108, 41 N. E., 760, 49 L. R. A., 353, 48 Am. St. Rep. 305.

There is no estoppel here of the Exchange, or its officers, that can be invoked by complainant.

The decree of the court of civil appeals affirming the chancellor in dismissing the bill was correct, and the writ of *certiorari* is denied.

Pemiscot County Bank v. Wilson-Ward Co.

PEMISCOT COUNTY BANK v. WILSON-WARD CO. *

(Jackson. April Term, 1916.)

1. BANKS AND BANKING. Liability of acts of cashier.

A bank and its receiver in insolvency are bound by the act of its cashier in issuing drafts and by the admission of value received contained in such drafts, in the absence of proof that the payee had actual or constructive knowledge of the fraud of the cashier or the falsity of such admission. (*Post*, pp. 428-432.)

Cases cited and approved: Northern Bank v. Johnson, 45 Tenn., 88; Water Co. v. Bank, 123 Tenn., 364.

Case cited and distinguished: Bank v. Bank, 132 Tenn., 152.

2. BANKS AND BANKING. Authority of cashier. Drafts drawn by cashier to himself.

A cashier has no implied authority to draw drafts in his own favor or in favor of a creditor in payment of individual debts, and the payee of such drafts is put on notice of the facts, is not an innocent holder, and may be compelled to account to the bank for the amount. (*Post*, pp. 428-432.)

3. BANKS AND BANKING. Liability of bank for wrongful acts of cashier.

The payee of a draft, knowing that the cashier of the bank of issue was interested in the firm for whose debt the draft issued, and was secondarily liable for such debt, but believing the debtor firm to be solvent, is not charged with notice that the draft was issued through fraud of the cashier or that the bank received no consideration therefor, and such payee cannot be compelled to reimburse the bank. (*Post*, pp. 432, 433.)

4. BANKS AND BANKING. Liability of bank for wrongful acts of cashier.

A bank may not hold its officers as worthy of confidence, and yet reap profits from frauds which they are thereby enabled to perpetrate. (*Post*, pp. 453, 434.)

* On liability of bank on negotiable paper executed by officer or agent see note in 21 L. R. A. (N. S.), 1079.

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Cases cited and approved: Polk v. Kirkland, 56 Tenn., 292; Railroad v. Stewart, 81 Tenn., 432.

FROM SHELBY

Appeal from the Chancery Court of Shelby County.
F. H. HEISKELL, Chancellor.

BOYD & BEJACH, for complainant.

CHAS. M. BRYAN, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The Pemiscot County Bank, a corporation under the laws of the State of Missouri, and authorized to do a general banking business, was on the 21st day of July, 1914, insolvent, and the Citizen's Trust Company was duly appointed and qualified as receiver of the insolvent institution, and thereafter, on the 22d day of August, 1914, the receiver filed a bill in this cause against the defendant Wilson-Ward Company, a corporation under the laws of Tennessee, with its *situs* at Memphis, in the county of Shelby. The bill prayed for a decree against the defendants for the aggregate sum of two drafts, the first of which was dated at Caruthersville, Mo., January 29, 1912, and payable to the order of Wilson-Ward Company for the sum of \$5,373.28, drawn by Pemiscot County Bank, by A. C. Tindle, cashier, and drawn on Security

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Bank & Trust Company, Memphis, Tenn.; the second of which drafts was, in substance, the same as the first, except that it was dated February 1, 1913, and was for the sum of \$5,439.68. On the face of each draft, after the words and figures indicating the amount, appeared the words, "Value received, and charge same to account of," then the signature and name of drawee.

The stipulation shows that defendants had no actual knowledge of any misconduct or fraud on the part of A. C. Tindle at the time the drafts signed by him were given them; nor did they have any actual knowledge that said drafts were not paid for when issued; nor any actual knowledge that any funds of the bank had been used improperly until just before and at the time the suit herein was filed. Defendant did not know at the time it received the proceeds of the drafts that Tindle was embezzling the amount of each draft from the Pemiscot County Bank, nor did it know that the amount of each draft was not charged on the books of the bank to either Tindle, W. A. Ward, or Salle M. Roberts, or any other person. Defendant did not know at said time that no consideration was received by the Pemiscot County Bank for the amount of each of the drafts.

Under these facts is the defendant liable? If so, its liability must be predicated on something beyond what appears on the face of the drafts; for these do not carry notice, either actual or constructive, of any misappropriation by Tindle of the funds of the bank. Each draft shows that a fund of the bank is drawn

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upon to pay Wilson-Ward Company a sum certain. And it appears on the face of each draft that the bank had received value therefor. The notice given by each draft on its face was not that the funds of the bank were being used without valuable consideration moving to the bank, but on the contrary, that the bank had received valuable consideration for the use of its funds. So it is clear that we must pass beyond the face of the drafts and into the realm of facts surrounding the transaction in order to determine the question of liability. Passing over this border line, it is apparent that the defendant knew the bank was not indebted to it, but that the gin company was, in the exact amount of each of the drafts. The gin company was a customer of the bank. Tindle was interested in the gin company, and was the cashier of the bank. The bank and the gin company were each going concerns. It is stipulated that defendant believed the gin company to be solvent, and it is not shown that defendant had any reason to believe the bank to be insolvent. The dishonor of the gin company's check by the bank did not indicate the insolvency of the bank nor any misappropriation of the funds of the bank by Tindle. Unexplained, this circumstance would have indicated financial distress of the gin company, but the circumstance was not unexplained. Promptly upon the dishonor of the check Tindle, representing both the bank and its customer, the gin company, sent a messenger to Memphis with the first draft on the funds of the bank to cover the amount of the check, and, no

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doubt, clearly explained to the satisfaction of defendant why the check had not been paid. That the dishonor of the check must have been explained to the satisfaction of defendant is shown by its continued extension of credit to the gin company during the balance of the year 1912, and until February 1, 1913, when the second draft was paid to cover a balance due defendant originating after the payment of the first draft, being larger in amount than the indebtedness paid by the first draft. On the face of each of the drafts was an admission by the bank's trusted officer, its cashier, that the bank had received value for each draft. This was an admission by the chief executive officer of the bank. He was an officer clothed with authority by implication of law to speak for the bank touching the matter of the consideration which the bank had received for the issuance of each of the drafts. In the issuance of the drafts this officer was acting within the apparent scope of his authority, and in accord with well-known usage in the banking business, and, in the absence of any actual or constructive knowledge by defendant of the fraud of this officer, or of his failure to see to it that the bank had received value for each of these drafts, his statement that it had received value was binding on the bank, and is binding on the receiver of the bank. *Northern Bank v. Johnson*, 45 Tenn. (5 Cold.), 88; *Water Co. v. Bank*, 123 Tenn. (15 Cates), 364, 131 S. W., 447; 1 Michie, Banks & Banking, Section 102, p. 713; *Bank v. Bank*, 132 Tenn. (5 Thomp.), 152, 177 S. W., 74. The general rule was stated, in substance, in

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the case last named, as we have applied it above, and it is said in the opinion in that case:

“Among the powers ordinarily inhering in the office or position of cashier is that of issuing and signing drafts drawn on funds of his bank on deposit with a correspondent bank. 1 Morse, Banks & Banking, Section 154; 1 Michie, Banks & Banking, Section 102, page 710.

“By way of exception to this rule of law a cashier, as such, has no implied power to draw such drafts in his own favor, or in favor of a creditor in payment of his own debts; and a person who accepts a draft drawn by a cashier, payable to himself, or used in payment of the individual indebtedness of himself, is put on notice that the fiduciary is discharging his own obligation with the funds of his principal, the bank, and the recipient is not to be treated as an innocent holder of the draft or its money product, and may be called to account for the proceeds by the bank. As Lord Denman observed of commercial paper so drawn: ‘It bears its death wound on its face.’ The duty of the recipient is to make inquiry to ascertain whether, there being a lack of inherent power, there existed authority on the part of the cashier from his corporate principal, by way of special or express grant, or by way of implication from a course of like conduct for a long time, acquiesced in by the bank.”

The opinion cites numerous authorities to sustain its text. We think the present case falls within the general rule stated in *Bank v. Bank*, and not within the exception above quoted.

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Defendant knew that Tindle, the cashier of the bank, was also interested as a stockholder in the gin company, and was an indorser on the notes which made up the aggregate debt for which each draft was given. But the aggregate debt for which each draft was given was the debt of the gin company to the bank, and Tindle was not primarily, but only secondarily, liable on this aggregate debt. It is admitted that defendant believed the principal obligor, the gin company, to be solvent at the payment of each of the drafts. Defendant knew the gin company prior to the payment of the first draft had forwarded to defendant its check on the bank, indicating, of course, that the gin company was a customer of the bank; and, although payment of this check was refused by the bank, the reason for this action was, as already shown, explained, and the dishonor of the check made good by substitution of the first draft for the check. These facts indicated that the gin company was a solvent customer of the bank, and, when considered in connection with the admission on the face of each draft that the bank had received value therefor, all the circumstances indicated to defendant that in the issuance of the draft the cashier was but in the performance of his implied authority so to act for the bank, and that his action was fair and honest. Opposed to the foregoing indicia of fairness and honesty in the transaction, the single circumstance resting in the knowledge of the defendant that Tindle was secondarily liable on the aggregate indebtedness

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of the gin company making up the amount which each draft was given to cover was not sufficient to put defendant on notice and charge it with knowledge of the frauds which Tindle practiced upon the bank in the issuance of each of the drafts without valuable consideration moving to the bank. To give this single circumstance the weight of actual or constructive notice of the fraud of the cashier would not only extend the exception to the general rule, but would work injustice under the facts of the present case. It would be to charge the defendant with a degree of care in the acceptance of commercial paper much beyond the ordinary. The insistence that such extraordinary care should have been exercised by defendant overlooks the potent fact that the bank and its other officials held Tindle out to the public, of which the defendant was a part, as an official whose honesty and integrity could be relied on, and yet seeks to fasten liability on defendant because it trusted the chief officer and agent of the bank, for whom the latter and its officials had vouched.

The law does not allow that a bank may hold out its officers to the public as worthy of confidence, and yet reap profit from frauds which they are thereby enabled to perpetrate. 3 R. C. L. Section 86, and cases cited in note 10. Every man is presumed to be innocent of violation of law, and to obey it. *Polk v. Kirkland*, 9 Heisk. (56 Tenn.), 292. The presumption of law is always in favor of the performance of duty. *Railroad v. Stewart*, 13 Lea (81 Tenn.), 432.

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Defendant, though clothed with knowledge that Tindle was secondarily liable for the debt of the gin company, yet having also knowledge of all the other circumstances mentioned, could properly presume that the bank was holding out as its cashier an honest man, who would not violate the law by appropriation of the funds of the bank without consideration to pay the debt of the gin company, and that the cashier would not violate his duty by issuance of the drafts in fraud of the rights of the bank.

Believing, as it did, that the gin company was solvent, why should defendant have supposed that the cashier had defrauded the bank in the issuance of the drafts. The defendant could not have supposed that the motive of the cashier was to avoid his secondary liability for the debts of the gin company because, as is admitted, defendant believed the gin company to be solvent, and knew that the primary liability on the debts was against the gin company, and not against the cashier. Commerce is conducted largely on the faith which man has in the integrity of his fellows, and that considerable portion of commerce which is done by means of such drafts as those used in this case would be paralyzed if each recipient of such paper were required to institute a private investigation to determine whether or not the bank of issuance was defrauded when the paper left its hands.

We think the decree of the chancellor was correct, and it is affirmed at appellant's cost.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION

NASHVILLE, DECEMBER TERM, 1915.

LOUISVILLE & N. R. Co. v. MRS. S. H. MARLIN.

(*Nashville*. December Term, 1915)

1. CARRIERS. Injuries by servant. Wanton acts.

Where an employee of a railway company compelled trespassers stealing a ride to jump from the train when it was passing over a trestle, although they had intended to alight shortly, his act was wanton, and where the trespassers were injured, furnishes ground for an action of damages. (*Post*, p. 439.)

2. CARRIERS. Carriage of passengers. Sleeping car employees.

With respect to passengers, employees in charge of a Pullman car are held agents of the railroad company, and are bound to refrain from injuring passengers as well as to protect them, but such agency does not exist with respect to trespassers. (*Post*, pp. 439-445.)

Cases cited and approved: Railroad v. Lillie, 112 Tenn., 332; Railroad v. Ray, 101 Tenn., 1; Railroad v. Katzenberger, 84 Tenn., 380; Penn. R. Co. v. Roy, 102 U. S., 451; Dwinelle v. Railroad,

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120 N. Y., 117; *Campbell v. Seaboard Air Line R. Co.*, 83 S. C., 448; *Railroad v. Derry*, 47 Colo., 584; *Gannon v. Railroad*, 141 Iowa, 37; *Terry v. Burford*, 131 Tenn., 451; *Union Railway Co. v. Carter*, 129 Tenn., 459; *Memphis St. Ry. Co. v. Stratton*, 131 Tenn., 620; *Blake v. Railroad*, 38 Tex., Civ. App., 337; *Railroad v. Elliott*, 41 Tenn., 611; *Railroad v. Mitchell*, 58 Tenn., 400; *Railroad v. Connor*, 83 Tenn., 254; *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass., 207; *Railroad v. Meacham*, 91 Tenn., 428.

3. MASTER AND SERVANT. Acts of agent. Responsibility for.

A principal is liable for injuries inflicted on a third person by the acts of his agent within the scope of the agent's authority, though such acts were in violation of instructions. (*Post*, pp. 439-445.)

4. MASTER AND SERVANT. Acts of agent. Responsibility of principal.

A master is liable for the acts of his servant within the scope of the servant's authority, to one injured, though such person did not bear any contractual relation to the master. (*Post*, pp. 439-445.)

5. CARRIERS. Carriage of passengers. Duty of care.

A carrier of passengers is bound to exercise the highest degree of care for their safety, but its only duty to a trespasser is to refrain from wilfully injuring him. (*Post*, pp. 439-445.)

6. CARRIERS. Acts of agent. Responsibility of principal.

The employees of a Pullman car are deemed agents of the railroad company only with their relations to passengers, such employees having no control over the management of the train. Decedent, who had been stealing a ride on the top of a train, climbed down to the platform of a Pullman car shortly before the train reached the station. The Pullman car conductor compelled decedent to jump from the moving train while it was on a high trestle, and from resulting injuries decedent died. There was nothing to show that decedent was about to annoy Pullman passengers or to even enter the car, and the act of the conductor was a purely personal matter of his own. *Held*, that the railroad company was not responsible for the act of the

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Pullman car conductor, for such person was not its agent or servant. (*Post*, pp. 439-445.)

FROM DAVIDSON

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
M. H. MEEKS, Judge.

KEEBLE & SEAY and F. M. BASS, for plaintiff in error.

W. H. WASHINGTON and LEVINE & LEVINE, for defendant in error.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This was an action brought in the circuit of Davidson County by the defendant in error to recover damages for the alleged unlawful killing of her husband, Sam H. Marlin. At the close of the evidence of the plaintiff below, and again at the close of all the evidence, the plaintiff in error moved for a peremptory instruction, but this motion was denied. The case then went to the jury, who rendered a verdict against the plaintiff in error, and from the judgment rendered on that verdict, an appeal was prosecuted to the court of civil appeals, and there the judgment was affirmed. The case then came to this court under the writ of *certiorari*.

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The only error assigned is the failure of the trial judge to sustain the motion for a peremptory instruction, and the refusal of the court of civil appeals to reverse his judgment.

There is no doubt the deceased was a trespasser, and the only evidence as to the manner of his death is the following:

Sam H. Marlin, the deceased, and his brother W. P. Marlin, being in Louisville, Ky., and desiring to come to Nashville, Tenn., where the family of the former resided, and being unwilling or financially unable, to take passage in the usual way, paid a dollar to an employee in the yards at Louisville to "square them through," a sum much less than the fare. Following the advice of the employee referred to, they got upon the tender, and thence upon the top of one of the coaches composing part of a passenger train bound from Louisville to Nashville. They rode on top of the train until it entered Nashville. At this stage of the journey, and at a point not very far from the depot, they climbed down from the roof of the rear coach, a pullman sleeping car, onto its rear platform. Here they encountered the conductor of the sleeping car, who by threatening to strike them with his metal-bound lantern, compelled them to jump off while the train was passing over a high trestle between Cherry and Cedar streets, in Nashville. This occurred about two o'clock in the morning. As the result of the jump, defendant in error's husband sustained injuries which caused his death within a few hours.

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The act was wanton and cruel, and, though defendant in error's husband was a trespasser, pure and simple, without a shadow of right on the train, still damages should be allowed if the conductor of the sleeping car was a servant of the railroad company. The whole case therefore turns upon the decision of this question.

The written contract between the Pullman Company and the railroad company, if there was one, is not shown in the evidence. We have nothing but the testimony of two employees of the Pullman Company as to the relations of the two companies. According to this evidence, their relations were, viz.:

The Pullman Company furnished its special facilities, well known to every one, to such of the passengers of the railway company as were willing to pay to the former company the extra charge made therefor. The Pullman conductor collected only the fare due to his company, except that when passengers came in late, and desired to retire, he took up their railway tickets, and turned them over to the railway conductor; this for the comfort of the passengers, to save the necessity of their being aroused by the railway conductor on his subsequent passage through the sleeping car. The Pullman car is manned by only two persons, a conductor and a porter. Both of these are employed and paid by the Pullman Company, receive all of their orders from it, and receive no orders from the railway company. It is the duty of these two servants of the Pullman Company to look after

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the comfort of such of the railway company's passengers as enter the sleeping car and pay for its accommodations. It is also their duty to protect any such passenger from insult or from assault, or other injury, offered by any person within the car, whether such aggression be offered by another passenger, or by an intruder who may enter the car. If an intruder enters, it is the duty of the Pullman conductor to ask him to withdraw, and, if he refuse, then to call the matter at once to the attention of the railway conductor, whose duty it is to remove such person. In case an assault should be attempted upon any lawful occupant of the Pullman car, and its violence or suddenness should not permit the delay required to call in the railway conductor or the train crew, it would be the duty of the Pullman servants to act at once and, if necessary to the protection of the party assaulted, to eject the offending person from the car. But the servants of the Pullman Company have no authority to eject any one from the train, not even an intruder upon one of its cars. Such removal can be effected only by the railway conductor, or some member of the train crew.

It may be stated that the conductor of the Pullman car, and also the train conductor, each one, denies that he ejected Sam H. Marlin, or any other person from the train on the night in question, as sworn by W. P. Marlin, the brother of the deceased, and each testifies that he never heard of the alleged occurrence until the present suit was started. However, in dis-

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posing of the motion for a peremptory instruction, this phase of the evidence cannot be considered at all, but only the evidence as previously related tending to show liability.

Assuming, as we must when considering the motion for a peremptory instruction that the Pullman conductor forced Marlin to jump from the car, was he acting as the agent of the railway company? We are unable to perceive how such a conclusion could be reached on the facts stated. It is insisted for the defendant in error that the servants of the Pullman Company owed to the railway company the duty of protecting the passengers of the latter who were being transported in the sleeping car, and so far forth were the agents of the railway company; that the presence of an intruder on the rear platform of the Pullman at two o'clock in the morning was a menace to passengers; that in ejecting him from the car, and from the train, the Pullman conductor was protecting the railway company's passengers in the sleeper, and although he exceeded his authority, in the method he adopted to effectuate the protection, still he was acting within the general scope of the authority to protect, and therefore his superior, or master, in the special matter became liable for his act.

It is true that, as between the railway company and its passengers, the porter and the conductor in charge of a sleeping car are held to be the agents of the railway company of whose train the sleeping car forms a part, and responsibility for their acts, as

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affecting passengers, is imposed accordingly (*Railroad v. Lillie*, 112 Tenn., 332, 342, 343, 78 S. W., 1055; *Railroad v. Ray*, 101 Tenn., 1, 10, 1 S. W., 554; *Railroad v. Katzenberger*, 16 Lea [84 Tenn.], 380, 1 S. W., 44, 57 Am. Rep., 232; *Penn. R. Co. v. Roy*, 102 U. S., 451, 26 L. Ed., 141; *Dwinelle v. New York Central & H. R. Co.*, 120 N. Y. 117, 24 N. E., 319, 8 L. R. A., 224, 17 Am. St. Rep., 611; *Campbell v. Seaboard Air Line R. Co.*, 83 S. C., 448, 65 S. E., 628, 23 L. R. A. [N. S.], 1056, and note, 137 Am. St. Rep., 824; *Denver & R. G. R. Co. v. Derry*, 47 Colo., 584, 108 Pac., 172, 27 L. R. A. [N. S.], 761, 764; *Gannon v. Chicago, R. I. & P. R. Co.*, 141 Iowa, 37, 117 N. W., 966, 23 L. R. A. [N. S.], 1061), and that is their duty not only to refrain from injuring passengers, but to protect them (same authorities); and it is also true that a servant, acting within the general scope of his authority, makes the master responsible, even though he acts without instructions, or exceed his instructions (*Terry v. Burford*, 131 Tenn., 451, 175 S. W., 538, L. R. A., 1915F, 714; *Union Railway Co. v. Carter*, 129 Tenn., 459, 166 S. W., 592; *Memphis St. Ry. Co. v. Stratton*, 131 Tenn., 620, 176 S. W., 105, L. R. A., 1915E., 704; *Dwinelle v. New York Central & H. R. R. Co.*, supra). It is also true, in general, that a party, injured by a servant acting within the scope of his authority, need not, as a condition of liability, stand in any contractual relation to the master, but may be wholly a stranger. *Memphis St. Ry. Co. v. Stratton*, supra. But neither the principles

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stated nor the authorities cited support the case sought to be made by the defendant in error. There is not a scintilla of evidence that the passengers within the sleeper or anywhere on the train were in the slightest danger, or that the Pullman conductor even purported to act on such ground. The mere fact that the two men climbed down from the top of the car, onto the rear platform, when the train was nearing the depot, could furnish no inference on which to base fear of danger. There was no threat; no offer to enter the car; no request that such entry be permitted. It was perfectly obvious to the Pullman conductor that the two men had been stealing a ride—indeed W. P. Marlin says he told the officer mentioned that they had boarded the train at Louisville—and that they were climbing down from the roof preparatory to leaving the train, when it should reach the depot. In truth, W. P. Marlin says such was their purpose. So, there was nothing in fact, or in appearances even, that could call into action the duty of the Pullman conductor to protect the passengers. Therefore, if the two intruders were driven from the platform of the sleeper, and forced to jump from the moving train, in the manner testified to by W. P. Marlin, the act was one purely wanton and malicious, and performed in his personal capacity by the Pullman conductor, wholly disconnected from any agency, actual or constructive, for the railway company.

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The only theory of liability showing any plausibility was that put forward by the defendant in error, which we have just considered, and found wanting in soundness. It was not possible to support the proposition that the law would impute to the employees of the Pullman Company an agency for the railway company as respects trespassers, or the relation of master and servant between them in respect of the conduct of such employees towards trespassers. *Blake v. Kansas City Southern Railway Company*, 38 Tex. Civ. App., 337, 85 S. W., 430. The general relation of master and servant does not exist between such persons and a railway company hauling a Pullman car manned by Pullman employees (4 Elliott on Railroads, section 1625), but only as respects passengers. The reasons which justify the imputation of an agency or servanthood in respect of passengers wholly fail when applied to a trespasser. The railway company owes to its passengers the duty of highest care (*N. & C. R. R. Co. v. Elliott*, 1 Cold. [41 Tenn.], 611, 78 Am. Dec., 506; *Railroad v. Mitchell*, 11 Heisk. [58 Tenn.], 400; *Railroad v. Connor*, 15 Lea [83 Tenn.], 254; *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass., 207, 19 N. E., 373, 2 L. R. A., 83, and note, 12 Am. St. Rep., 541), while to a trespasser it owes only the duty to refrain from intentionally injuring him (*Railroad v. Meacham*, 91 Tenn., 428, 19 S. W., 232). Having assumed a contract of carriage with a passenger, it cannot escape or evade its responsibility to him by turning him

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over to the employees of the Pullman Company. The law forbids it, and makes its veto perfect by treating the employees of the sleeping car company as the servants of the railway company, as respects such passengers. As to trespassers there is no contract and no duty of service, and public policy does not require the imputation of an agency.

It results that the trial court and the court of civil appeals were both in error, and their judgments are reversed. The motion for a peremptory instruction should have been sustained, and the suit dismissed. Doing now what should have been done, we sustain the motion, and dismiss the suit at the costs of the defendant in error.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION

JACKSON, APRIL TERM, 1916

ILLINOIS CENT. R. CO., *et al.* v. MORIARITY, *et al.*

(*Jackson.* April Term, 1916.)

1. EMINENT DOMAIN. Right to compensation.

Under Const. art. 1, sec. 21, providing that no property shall be taken or applied to public use without consent or without just compensation, when a portion of a street immediately adjacent to a complaining owner's property is obstructed so as to destroy or substantially impair the owner's easement of access or way in the street abutting his land, he is entitled to compensation. (*Post*, pp. 480-452.)

Cases cited and approved: *Anderson v. Turbeville*, 46 Tenn., 158; *Railroad v. Bingham*, 87 Tenn., 530; *Smith v. Railroad*, 87 Tenn., 630; *Hamilton County v. Rape*, 101 Tenn., 222; *State v. Taylor*, 107 Tenn., 463; *Coyne v. Memphis*, 118 Tenn., 651; *Humes v. Mayor of Knoxville*, 20 Tenn., 408.

Constitution cited and construed: Art. 1, sec. 21.

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2. EMINENT DOMAIN. Right to compensation. "Taking."

Under Const. art. 1, sec. 21, providing that no property shall be taken or applied to public use without consent or without just compensation, any diminution of the value of property directly invaded which is not shared by the public generally is a "taking." (*Post*, pp. 452-453.)

Cases cited and approved: *Richards v. Washington Terminal Co.*, 233 U. S., 546; *Railway v. Bingham*, 87 Tenn., 522; *Harmon v. Railroad*, 87 Tenn., 614; *Chattanooga v. Dowling*, 101 Tenn., 342; *Brumit v. Railroad*, 106 Tenn., 124; *Terminal Co. v. Jacobs*, 109 Tenn., 727; *Terminal Co. v. Lellyett*, 144 Tenn., 368; *Gossett v. Railway*, 115 Tenn., 376.

Case cited and distinguished: *Lewisburg & N. R. Co. v. Hinds*, 183 S. W., 985.

3. EMINENT DOMAIN. Right to compensation. Closing street.

Where a street is closed by elevation of railroad tracks not abutting on, but adjacent to, plaintiff's land, he is entitled to compensation under Const. art. 1, sec. 21, prohibiting taking property for public use without compensation, since his easement of access extends from his land to the next intersecting street in either direction. (*Post*, pp. 453-458.)

Case cited and approved: *Town of Clinton v. Turner*, 95 Miss., 594.

Cases cited and distinguished: *Newark v. Hatt*, 79 N. J. Law, 548; *Henderson v. Lexington*, 132 Ky., 390; *Vanderburgh v. Minneapolis*, 98 Minn., 329; *In re Melon Street*, 182 Pa., 397.

4. EMINENT DOMAIN. "Police power." Exercise of power. What constitutes.

Closing a street by elevation of railroad tracks for safety of the public is referable to the power of eminent domain, and not to the police power, since the latter, though it may take property, does not appropriate it to a different use; while eminent domain transfers private property to a public agency to use as its own. (*Post*, pp. 458-461.)

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Cases cited and approved: *Bradbury v. Vandalla Levee, etc., District*, 236 Ill., 36; *Turnpike Co. v. Davidson County*, 91 Tenn., 291.

Case cited and distinguished: *McKeon v. N. Y., N. H. & H. R. Co.*, 75 Conn., 343.

5. EMINENT DOMAIN. Right to compensation.

Rights of railroads put to expense in elevating tracks are not like those of adjacent landowners whose easement of access is destroyed by the elevation of tracks, since the railroads still have their original easement, but the owners do not. (*Post*, p. 461.)

6. APPEAL AND ERROR. Scope of review. Intermediate court. amount of damages.

Where the trial court and the court of civil appeals concur as to the amount of damages to a property owner by destruction of his easement of access by elevation of railway tracks across an adjacent street, and the evidence is conflicting, the supreme court will treat such concurrent finding as conclusive. (*Post*, p. 461.)

Cases cited and approved: *Grant v. Railroad*, 129 Tenn., 398; *Carolina, etc., R. R. Co. v. Shewalter*, 128 Tenn., 363.

FROM SHELBY

The defendants in error are the owners of business property on the corner of Main street and Virginia avenue, in Memphis. The premises front on Main street, which runs north and south, forty-two and one-half feet, and extend back along Virginia avenue, which runs east and west one hundred feet.

The city of Memphis undertook a scheme to do away with grade crossings in certain sections of the

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municipality, and in the progress of this work it was necessary that the tracks of the plaintiffs in error at the point where they cross Virginia avenue in the rear of the premises described be elevated above the level of the street several feet. This elevation of the railroad tracks was intended to close, and did close, Virginia avenue at this point. The obstruction was at a point on Virginia avenue between Main street and the next parallel street east of Main street. There was a contract between the city and the railroad companies by the terms of which the latter were to pay for damages to property.

This suit was brought against the city of Memphis and the defendant railroad companies to recover damages alleged to have been suffered by the property of defendants in error in consequence of the closing of Virginia avenue at the point mentioned. There was a judgment in favor of the property owners for \$3000, which was affirmed by the court of civil appeals, and the case is before us on petition for *certiorari* filed by the railroad companies. A nonsuit was taken as to the city in the trial court.

It is first insisted in behalf of the railroad companies that the landowners sustained no special damages for which they are entitled to a recovery; that the damages suffered were only such as were common to other members of the community; and that the case is a proper one for the application of the principle of *damnum absque injuria*.

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The contention of the landowners is that there was a taking of their easement of access or easement of way in Virginia avenue, for which they are entitled to compensation under the Constitution of the state and under the federal Constitution.

For more than fifty years this court has in published opinions recognized the right of an abutting landowner to ingress and egress between his property and the street, and a right of passage in the street bounding his property. Such property right has been called an easement of access or an easement of way in the street, and in numerous cases the court has held that such property right could not be taken from the abutting land owner without compensation.

It has been said that such owners had an easement of way in the street in addition to the use of it in common with the people generally; that such easement was private property as much as if it were corporeal property; that the rights of the abutting owners might not be ignored by the municipality, but must be reasonably preserved or compensation paid for injury done them; and that, if such easement was taken away or impaired or incumbered without the consent of the landowner, there was a taking of his property for public purposes for which he was entitled to compensation. *Anderson v. Turbeville*, 46 Tenn. (6 Cold.), 158; *Railroad v. Bingham*, 87 Tenn., 530, 11 S. W., 105; *Smith v. Railroad*, 87 Tenn. 630, 11 S. W., 709; *Hamilton County v. Rape*, 101 Tenn.,

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222; 47 S. W., 216; *State v. Taylor*, 107 Tenn., 463, 64 S. W., 766; *Coyne v. Memphis*, 118 Tenn., 651, 102 S. W., 355.

It is true that some of these expressions of the court were unnecessary to the disposition of the particular matters then under consideration, but none the less they all serve to illustrate the opinion this court has entertained as to the nature of the right of an abutting owner to an easement of access to an adjacent street and to an easement of way in the street.

In all these cases it was distinctly held that the destruction or serious impairment of the landowner's right of ingress and egress was a taking of his property—a taking of his easement of access or easement of way in the adjacent street. This being so, compensation is secured to the landowner by the provisions of the Constitution, art. 1, section 21.

It cannot be doubted therefore, under the adjudicated cases in this State, that, when that portion of the street immediately adjacent to the complaining owner's property is obstructed so as to destroy or substantially impair the owner's aforesaid easement of access or easement of way, such owner is entitled to compensation.

There is one case in Tennessee said to be to the contrary, namely, *Humes v. Mayor of Knoxville*, 1 Humph. (20 Tenn.), 408, 34 Am. Dec., 657. This, though, is a change of grade case. Perhaps it might be distinguished on that ground. It is not necessary,

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however, to comment on this case, for its authority has in two later cases been confined to actions in tort, and cases like the one at bar are said not to involve a question of tort, but of taking a valuable property right without compensation. *Hamilton County v. Rape*, supra; *Coyne v. Memphis*, supra.

In the case before us we are asked to go beyond our previous decisions. Our former cases have protected the landowner's easement of way in the street immediately adjacent to his premises. They have declared that he might not be deprived of access to the street on which his land abutted, and that his easement of way in this portion of the street might not be taken, without compensation.

We are now asked to hold that this easement of way in the adjacent street extends in both directions beyond the land of the owner, and that the owner is entitled to compensation if the street be closed beyond the limits of his property. In this case there has been no interference with the landowner's easement of way in Main street. Only Virginia avenue has been obstructed, and that obstruction is located at a point in the rear of the premises described, and the easement of way is only impaired to this extent. Still the plaintiff's premises has lost the special value attached to a corner lot.

The question then is: How far does this private right to an easement of way extend?

The answer is to be determined by considering when the damage of the landowner ceases to be special and

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becomes common to the public. The difficulty lies in determining what is special damage.

In the late case of *Lewisburg & N. R. Co. v. Hinds*, 183 S. W., 985, this court adopted a recent expression from the supreme court of the United States as follows:

“Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a ‘taking’ within the constitutional provision.” *Richards v. Washington Terminal Co.*, 233 U. S., 546, 34 Sup. Ct., 654, 58 L. Ed., 1088, L. R. A., 1915A, 887.

It was said in *Lewisburg & N. R. Co. v. Hinds*, supra, that our own cases are to the same effect, citing *Railway v. Bingham*, 87 Tenn., 522, 11 S. W., 705; *Harmon v. Railroad*, 87 Tenn., 614, 11 S. W., 703; *Chattanooga v. Dowling*, 101 Tenn., 342, 47 S. W., 700; *Brumit v. Railroad*, 106 Tenn., 124, 60 S. W., 505; *Terminal Co. v. Jacobs*, 109 Tenn., 727, 72 S. W., 954, 61 L. R. A., 188; *Terminal Co. v. Lellyett*, 114 Tenn., 368, 85 S. W., 881; *Gossett v. Railway*, 115 Tenn., 376, 89 S. W., 737, 1 L. R. A. (N. S.) 97, 112 Am. St. Rep., 846.

The converse of the proposition quoted is true, as the cases cited demonstrate, and any diminution of the value of property, directly invaded at least, which is not shared by the public generally, is a taking within the constitutional provision.

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The courts have found much difficulty in determining where special damage shades into general damages. A number of well-considered modern cases involving the closing of streets have declared that the landowner's private easement of way extends along the street on which his property abuts to the intersecting streets on either side. This rule, while it may seem somewhat arbitrary, is probably the most satisfactory result that can be reached.

In the cases just mentioned proceedings to recover were had under statutes and Constitutions with varying provisions. The plaintiff's right to recover in all these cases, however, was apparently made to depend on the specialty or peculiarity of his damages. The facts in the cases to which we shall refer were similar to the facts of the case before us.

The New Jersey Court of Errors and Appeals has said:

"There is nothing to be found in the adjudged cases in this State inconsistent with the view that the right of the public in an open highway is of passage over it, and that this right the abutting owner has in common with the public, and suffers in common with it when deprived of such right by an obstruction to that use, and that there is, in addition to this, at least a special right of access to his land from the next adjacent intersecting streets over the highway on which it bounds, and that such right of access, in either direction the street allows, is a special advantage to the lands lying on it between any two inter-

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secting streets. It is not a question whether the land adjoins the vacated portion or not, but rather will its value be impaired if deprived of one of the immediate means of access to it? We are of opinion that such right of access is of special advantage to all the land abutting a highway in a block between two streets, and that the vacation of a part of such street diminishes the value of all the land between the next adjacent cross streets. . . .” *Newark v. Hatt*, 79 N. J. Law, 548, 77 Atl., 47, 30 L. R. A. (N. S.), 637.

The Kentucky court of appeals has said:

“But our conclusion upon this question is that the only persons who are entitled to compensation and are necessary parties to the proceeding are those whose property abuts upon or adjoins the street, alley, or highway proposed to be closed. We do not mean by this to limit the property owners entitled to compensation or who are necessary parties to the action to those who own property immediately at the point of closure, but think it should embrace all persons and all property abutting upon the street proposed to be closed. To illustrate, if it is desired to close a portion of the street or the entire street known as A. between B. and C. streets, then all the persons owning property upon A. street between B. and C. streets are necessary parties to the action, and entitled to compensation.” *Henderson v. Lexington*, 132 Ky., 390, 111 S. W., 318, 22 L. R. A. (N. S.), 20.

The Minnesota supreme court has held that an owner of lots on a street which has been vacated from

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the line of such lots to another street a portion of which was also vacated, and which bounded on one side the block in which said lots are located, thus cutting off his means of access from that portion, and leaving his property fronting on a cul-de-sac, suffers an injury special and peculiar to his property, not common to the public at large, and is entitled to compensation under the constitutional provision which forbids the taking or damaging of private property for public use without compensation. *Vanderburgh v. Minneapolis*, 98 Minn., 329, 108 N. W., 480, 6 L. R. A. (N. S.), 741.

While the opinion of the Minnesota court calls attention to the fact that their Constitution contains a provision for compensation for property damaged as well as property taken, nevertheless the court held that the damage sustained in this case was special.

In *Vanderburgh v. Minneapolis*, supra, the court said:

“The injury in such case is not of the same kind, differing in degree only, but is an additional injury caused by the impairment of an entirely distinct right—the right of ingress and egress. A property owner’s special right in such cases is not limited to the part of the street on which his property abuts; his right in this respect is the right of access in any direction which the street permits, and, as affecting the same, no distinction can be drawn between a partial and a total destruction.”

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The Pennsylvania supreme court has held that owners of property abutting on that portion of the street which is not vacated, but which is left a cul-de-sac by vacating another part of the street, are entitled to damages under a statute referred to therein. *In re Melon Street*, 182 Pa., 397, 38 Atl., 482, 38 L. R. A., 275.

In disposing of the case above the Pennsylvania court said:

“Are we prepared to declare in this case that access to the claimant’s properties has not been impaired? Can the court say to these claimants: ‘One opening to your properties is sufficient for your purposes; therefore no legal injury has been done to you by closing the other? Could we say that, if their properties fronted on two parallel streets, or were on the corner of two streets, one of which was vacated? Is it not more in accord with sound principles to say that their right of access was not limited by the frontage of their properties, but extended to the two intersecting streets, and that it is for the jury to say whether, under all the circumstances, the claimants have suffered substantial damages in consequence of the closing of one mode of access?’” *In re Melon Street*, supra.

Mr. Lewis says:

“The extent and limits of the right of access cannot be well defined. But in general it includes the right to use the street as an outlet from the abutting property to a connecting highway by any mode of travel or conveyance appropriate to a highway, also the right to use the street in front of the property in connection with the

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use and enjoyment of the property, in such manner as is customary or reasonable." Lewis on Eminent Domain (2d Ed.) section 91h.

To like effect see *Town of Clinton v. Turner*, 95 Miss. 594, 52 So., 261.

We recognize the difficulty of the question. The courts are by no means in harmony in determining the limits of the abutting owner's easement of way—in saying when his damage ceases to be special. For other authorities see cases collected in notes to 2 L. R. A. (N. S.), 269; 30 L. R. A. (N. S.), 637; 46 L. R. A. (N. S.), 615; 10 R. C. L., p. 178.

It is well settled by our former decisions that every abutting owner has a right of ingress and egress, and that he has an easement of way in the street which bounds his property. We think it a just and fair result to hold that this easement of way or easement of access extends along any street or alley upon which his property abuts, in either direction, to the next intersecting street. An obstruction of the adjacent street within these limits is a taking of such private easement of way, for which compensation must be made.

It is possible that cases might arise in which an abutting owner's easement of way should be held to extend further, or should be more restricted, but, as a general rule, we announce the foregoing.

It is contended for plaintiffs in error that the obstruction of this easement of way was under the police power of the municipality, and not under the power of

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eminent domain, and that therefore, the landowner is entitled to no compensation.

It is sometimes quite difficult to distinguish between the exercise of the police power and the exercise of the power of eminent domain. We think, however, the closing of this street must be referred to the power of eminent domain.

The police power, although it may take property, does not appropriate it to another use as a general rule, but destroys the property. In eminent domain property is taken from the owner and transferred to a public agency to be enjoyed by the latter as its own. 10 R. C. L., p. 7, *Id.*, pp. 61, 62, and cases collected under note 16, p. 62.

In the case at bar a portion of Virginia avenue covered by the landowner's easement of way was taken from him and transferred to the plaintiffs in error. Plaintiffs in error now have the exclusive use of this portion of the street, and the defendants are deprived of the use thereof which they formerly enjoyed.

"While it is true that the courts will sustain a rather drastic interference with property rights, if the statute authorizing such interference is enacted in behalf of the public health, morals, or safety, it does not follow that every such enactment is an exercise of the police power. If private property is actually appropriated for a hospital, a prison, or to abolish a dangerous grade crossing, it is the power of eminent domain, and not the police power that is invoked." 10 R. C. L., p. 8.

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A case quite similar to the one before us came before the Connecticut supreme court, wherein a railroad company was required to elevate its roadbed to abolish a grade crossing, and the court held that the duty of the railroad company to pay damages inflicted on an individual by the consequent obstruction of his easement of way was not removed because the railroad company was compelled by the State to make the changes in its roadbed for the public good. The court said of the railroad company:

"It was not in position of an ordinary agent of the State, selected to construct a public work, in which such agent has no personal interest. Its railroad served both public and private uses. It received a private benefit from its franchise, and it was bound to bear whatever burdens the charter which gave it had attached to its exercise, when such exercise required and resulted in the appropriation to its own use of rights and property vested in another." *McKeon v. N. Y., N. H. & H. R. Co.*, 75 Conn., 343, 53 Atl., 656, 61 L. R. A., 730.

This case was taken to the supreme court of the United States and affirmed in 189 U. S., 508, 23 Sup. Ct., 853, 47 L. Ed., 922.

See, also, *Bradbury v. Vandalia Levee, etc, District*, 236 Ill., 36, 86 N. E., 163, 19 L. R. A. (N. S.), 991, 15 Ann. Cas., 904.

Theilan v. Porter, 14 Lea, 626, 52 Am. Rep., 173, relied on by plaintiffs in error, is not in point. There was no appropriation of property there, only the de-

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struction of property. Neither is *Turnpike Co. v. Davidson County*, 91 Tenn., 291, 18 S. W., 626, in point. In that case the court showed there was no taking.

The rights of the defendants here cannot be assimilated to the rights of the railroad companies, although the latter were required to go to considerable expense in the elevation of their tracks. True, the old road-bed of the railroad companies was destroyed, but their right of way or easement was not taken from them. There was only a regulation of the use of their easement. They were put to much expense, but they still have their easement of way unobstructed and improved. The condition of the railroad companies is more like that of a property owner who is required to pave the adjacent street, taking up his old pavement and laying a newer and better one.

On the amount of damages the trial court and the court of civil appeals have concurred. The evidence is conflicting, and there seems to be no reason for departing from our usual practice of accepting the concurrent finding of both lower courts on the matter of damages as conclusive. *Grant v. Railroad*, 29 Tenn., 398, 165 S. W., 963; *Carolina, etc., R. R. Co., v. Shewalter*, 128 Tenn., 363, 161 S. W., 1136, Ann. Cas., 1915C, 605.

Other assignments of error are made on the record, all of which have been considered. What has been heretofore said disposes of the points made in most of them. We do not regard the others as requiring a detailed discussion in this opinion.

The judgment of the court of civil appeals is affirmed.

Memphis St. Ry. Co. v. Cavell.

MEMPHIS ST. RY CO. v. CAVELL.

(Jackson. April Term, 1916.)

1. CARRIERS. Carriage of passengers. Degree of care.

The degree of care imposed on a carrier of passengers, such as a street railway, by law and on grounds of sound public policy, is the exercise of the utmost diligent skill and foresight. (*Post* pp. 465, 466.)

Cases cited and approved: *Ferry Co. v. White*, 99 Tenn., 256; *Railroad v. Flake*, 114 Tenn., 671; *Christie v. Griggs*, 2 Camp., 79; *Stokes v. Saltonstall*, 38 U. S., 181; *N. J. R. & Transp. Co. v. Pollard*, 89 U. S., 341; *Gleason v. Ry. Co.*, 140 U. S., 435; *Sweeney v. Erving*, 228 U. S., 233; *Inland & Seaboard Co. v. Tolson, Adm'r.*, 139 U. S., 551; *Chicago Union Traction Co. v. Uree*, 218 Ill., 9.

Case cited and distinguished: *Railroad v. Kuhn*, 107 Tenn., 106.

2. NEGLIGENCE. Res ipsa loquitur.

In general, mere proof that an accident injurious to plaintiff has occurred does not justify a verdict or judgment imposing liability therefor upon the defendant. (*Post*, pp. 466, 467.)

3. NEGLIGENCE. Burden of proof.

The law imposes on plaintiff suing for injuries caused by negligence the burden of showing by a preponderance of the evidence that the negligence was the cause of his injury, and that defendant was responsible for the negligence. (*Post*, pp. 467-470.)

Cases cited and approved: *Simpson v. Omnibus Co., L. R.*, 8 C. P., 390; *The Annot Lyle*, 11 P. D., 114; *The Indus*, 12 P. D., 46; *Carpus v. Railroad*, 5 Q. B., 747; *Skinner v. Railroad*, 5 Exch., 787; *Scott v. London Dock Co., S. H. & C.*, 596; *Kearney v. Railroad, L. R.*, 5 Q. B., 411; *Byrne v. Boadle*, 2 H. & C., 722; *Briggs v. Oliver*, 4 H. & C., 403; *Brown v. Union P. R. Co.*,

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81 Kan., 701; McGinn v. N. O. Ry. & Light Co., 118 La., 811; So. P. C. v. Hogan, 13 Ariz., 34; Railroad v. Hadley, 170 Ind., 204; Hughes v. Railroad Co., 85 N. J. Law, 212; Sweeney v. Erving, 228 U. S., 233.

Cases cited and distinguished: De Glopper v. Railway & Light Co., 123 Tenn., 633; Stokes v. Saltonstall, 13 Pet., 18.

4. NEGLIGENCE. Pleading and proof.

Plaintiff suing for injuries caused by negligence is under the burden that his proof in substance shall correspond with the averments of his pleadings. (*Post*, pp. 467-470.)

5. APPEAL AND ERROR. Harmless error. Instruction.

In an action against a railway for injuries, where, under all the evidence, there was no material issue of fact for the jury to determine on the question of defendant's negligence, error in charging the doctrine of *res ipsa loquitur* was harmless. (*Post*, pp. 470, 471.)

Case cited and approved: Lowry v. Railroad, 117 Tenn., 507.

6. CARRIERS. Injuries. Negligence. Question for jury.

In an action against a street railway for injuries to a passenger, where, under all the evidence, no reasonable difference of opinion can exist as to the negligent character of the acts of defendant's employees at a railroad crossing under the particular circumstances and at a particular time, the act was negligent in law, and there is no issue for the jury on the question of the negligence. (*Post*, p. 471.)

Case cited and approved: Traction Co. v. Carroll, 113 Tenn., 514.

7. CARRIERS. Carriage of passengers. Negligence.

Where a street railway's conductor in charge of a motor and trailer after walking upon straight railroad tracks gave the signal to the motorman to attempt the crossing, so that, though the motor got over the tracks, the trailer was struck by a train, the street railway was negligent, though the dust and noise of another train, which the motor had stopped to let go by, hindered the conductor's seeing and hearing the approaching train. (*Post*, pp. 471-475.)

Case cited and approved: Railroad v. Roe, 118 Tenn., 601.

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8. CARRIERS. Carriage of passengers. Negligence.

The negligence of a railroad in running a freight over a street railway crossing did not excuse such street railway, whose conductor was negligent in not making sure of the approach of the freight before attempting to cross, from liability to an injured passenger, since the passenger's injuries were the proximate result of the conductor's failure to discharge his duty. (*Post*, pp. 475-477.)

Acts cited and construed: Acts 1871, ch. 46.

Cases cited and approved: *Wallenburg v. Mo. Pac. R. Co.*, 86 Neb., 642; *N. Y. & H. R. R. Co. v. Maidment*, 168 Fed., 21; *Brommer v. Penn. R. Co.*, 179 Fed., 577; *Parker v. Des Moines City R. Co.*, 153 Iowa, 254; *Vincennes Traction Co. v. Curry* (Ind. App.), 109 N. E., 62.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from The Supreme Court.—J. P. YOUNG, Judge.

ROANE WARING, for plaintiff.

R. H. STICKLEY, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The court of civil appeals affirmed a judgment rendered by the circuit court of Shelby county in favor of Cavell for the sum of \$8,500, against the railway company, and the latter, by its petition for *certiorari*, seeks a review and reversal of the judgment of the court of civil appeals.

The point made by the assignment of error is that the court charged the doctrine of *res ipsa loquitur*, and that this doctrine can never apply where there is a collision between a vehicle belonging to the defendant and one belonging to some other party.

We will first consider the assignment upon the hypothesis that when the evidence was all in there was an open issue of fact on the question of defendant's negligence for the jury to determine.

The declaration was in one count and on the facts of the case, and showed the relation of passenger and carrier to have existed between plaintiff and the company when the injuries were inflicted for which he sued, and that the damages sought resulted from a breach by the carrier of the duty which the law imposed upon it when plaintiff was accepted as a passenger.

The declaration also averred divers particulars in which the servants of the company were negligent in the discharge of the duty so imposed. The company interposed its plea of the general issue.

The degree of care imposed on the carrier by law and on grounds of sound public policy is the exercise of the "utmost diligence, skill, and foresight." *Ferry Companies v. White*, 99 Tenn. (15 Pickle), 256, 41 S. W., 583; *Railroad v. Flake*, 114 Tenn. (6 Cates), 671, 88 S. W., 326; *Railroad v. Kuhn*, 107 Tenn. (23 Pickle), 106, 64 S. W., 202.

The doctrine laid down by Sir James Mansfield as to the degree of care required in such cases is that the duty of the carrier is to provide for the safety of its

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passengers "as far as human care and foresight will go." *Christie v. Griggs*, 2 Camp., 79. See, also, Hutchinson on Carriers (3d Ed.), vol. 2, section 896, and authorities cited at page 111 *et seq.* of 107 Tenn., 64 S. W., 202, in *Railroad v. Kuhn*, *supra*. The Supreme court of the United States, speaking through Justice Lamar, has said:

"Since the decision in *Stokes v. Saltonstall*, 38 U. S. (13 Pet.), 181, 10 L. Ed., 115, and *N. J. R. & Transp. Co. v. Pollard*, 89 U. S., 22 Wall., 341, 22 L. Ed., 877, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidably by human foresight." *Gleason v. Va. Midland Ry. Co.*, 140 U. S., 435, 11 Sup. Ct., 859, 35 L. Ed., 458.

But qualifying the doctrine of this case as to the burden of the evidence, see *Sweeney v. Erving*, 228 U. S., 233, 33 Sup. Ct., 416, 57 L. Ed., 815. As to the degree of care, see, also, *Inland & Seaboard Co. v. Tolson, Adm'r*, 139 U. S., 551, 11 Sup. Ct., 653, 35 L. Ed., 270. See, also, the authorities collated in a note accompanying *Chicago Union Traction Co. v. Mee*, 218 Ill., 9, 75 N. E., 800, 2 L. R. A. (N. S.), 725, 4 Ann. Cas., 7.

In general mere proof that an accident injurious to plaintiff has occurred does not justify a verdict or judgment imposing liability therefor upon the defendant.

The burden of proving negligence as the causal basis or origin of the injury as well as the burden of proving the responsibility of the defendant for the negligence the law imposes on the plaintiff.

The maxim is *ei qui affirmat, non ei qui negat, incumbit probatio*. Not only so, but the law imposes on the plaintiff the burden of showing the two essential elements of liability above mentioned by a preponderance of the evidence, and another burden imposed on the plaintiff is that his proof must in substance correspond with the averments of his pleadings.

As a general rule, proof that an accident injurious to plaintiff has happened, without more, is not evidence of negligence, and of course until the existence of negligence is shown no one is responsible for the injury, and in such case it is the plaintiff's misfortune. But while the law imposes the burdens we have mentioned, "when a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care." In the same case it is further said:

"If the act which caused the injury was shown by direct evidence, and all the circumstances of the accident were shown in the proof, and if the only reasonable explanation of the accident should give rise to an

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inference of negligence, then the rule of '*res ipsa loquitur*' would apply; but there can be no foundation for the application of this maxim where both the act which caused the injury and the negligence of defendant in relation to the act must be inferred from the accident itself. You cannot well say that an act is negligent, unless you know what it is. It is said in one case that the maxim under consideration can have no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care." *De Glopper v. Railway & Light Co.*, 123 Tenn. (15 Cates), 633.

Some of the English cases discussing the application of the doctrine are: *Per curiam*, 3 H. & C., 601; per Bovil, C. J., *Simpson v. Lond. Gen. Omnibus Co.*, L. R., 8 C. P., 390, 392; 42 L. J. C., p. 112; *The Annot Lyle* 11 P. D., 114; 55 L. J. Adm., 62; *The Indus*, 12 P. D., 46; 56 L. J. Adm., 88; *Carpus v. L., B. & S. C. R. Co.*, 5 Q. B., 747; *Skinner v. L. B. & S. C. R. Co.*, 5 Exch., 787; *Scott v. London Dock Co.*, 3 H. & C., 596; 34 L. J. Ex., 220; *Kearney v. L. B. & S. C. R. Co.*, L. R., 5 Q. B., 411, L. R., 6 Q. B., 759, 40 L. J. Q. B., 285; *Byrne v. Boadle*, 2 H. & C., 722. See, also, *Briggs v. Oliver*, 4 H. & C., 403; and per Lord Halsbury (1891), A. C. 335; Broom's Legal Maxims, pp. 253, 254.

"The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury. In cases where the duty is not absolute, like that of the

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common carrier to exercise the highest care and skill in regard to the safety of a passenger who has committed himself to its charge, but arises in the ordinary course of business, it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn." • Cooley on Torts (3d Ed.) section 1424.

See, also, Hutchinson on Carriers (3d Ed.), vol. 2, section 923; (3d Ed.), vol. 3, section 1414.

On the same subject see *Brown v. Union P. R. Co.*, 81 Kan., 701, 106 Pac., 1001, 29 L. R. A. (N. S.), 808; *McGinn v. N. O. Ry. & Light Co.*, 118 La., 811, 43 South., 450, 13 L. R. A. (N. S.), 601, and note; *Southern P. C. v. Hogan*, 13 Ariz., 34, 108 Pac., 240, 29 L. R. A. (N. S.), 813; *Cleveland, Cincinnati Chicago & St. L. Ry. Co. v. Hadley*, 170 Ind., 204, 82 N. E., 1025, 84 N. E., 13, 16 L. R. A. (N. S.), 527, 16 Ann. Cas., 1; *Hughes v. Atlantic City & Shore Railroad Co.*, 85 N. J. Law, 212, 89 Atl., 769, L. R. A., 1916A, 927; *Sweeney v. Erving*, 228 U. S., 233, 33 Sup. Ct., 416, 57 L. Ed., 815, Ann. Cas., 1914D, 905. In this the last-named case Mr. Justice Pitney discussed the doctrine of *Stokes v. Saltonstall*, 13 Pet., 181, 10 L. Ed., 115, cited supra, and said:

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“Reading of the report shows that the case turns upon the high degree of care owing by carrier to passenger, and that the court did not rule that the circumstances of the occurrence shifted the burden of proof upon the main issue. Such is the effect that has uniformly been given to the decision.”

After citing authorities to sustain the above quotation he concludes:

“In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions.”

What we have said would be a good answer to the first assignment on the hypothesis first mentioned, but we think a correct view of all the evidence is that there was no material issue of fact for the jury to determine on the question of the negligence of the defendant, and therefore if the court erred in charging the doctrine *res ipsa loquitur*, it was innocuous error, for error

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which does not injure the complaining party is not reversible. *Lowry v. Railroad*, 117 Tenn. (9 Cates), 507, 101 S. W., 1157.

If, upon all the evidence, no reasonable difference of opinion can exist among men as to the negligent character of the act of defendant's employees in carrying the street car on the crossing under the circumstances and at the time then that act was negligent in law, and there was no issue for the jury on the question of negligence. *Traction Co., v. Carroll*, 113 Tenn. (5 Cates), 514, 82 S. W., 313.

Passing now to a consideration of the evidence in order to determine if the act was negligent in law—when the street car, on which plaintiff was a passenger and had paid his fare, was on its way from Memphis to Raleigh and had reached the intersection where its track running east and west crossed double tracks of the railroad company running north and south at Binghampton, a freight train composed of fifty-two cars running south at a high rate of speed on the west track was about to pass over the crossing. When the street car reached this crossing it was about six thirty p. m. on September 17, 1914. The street car train was composed of a motor car and a trailer. On the motor car were a conductor and a motorman, and on the trailer there was an additional conductor. The motor car and the trailer were each equipped with gates or doors worked by levers managed by the employees in charge, and through these doors passengers boarded and were discharged from the cars. The windows in

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the cars were lowered, and the operatives in charge had a clear view of the railroad tracks both north and south of the crossing. These railroad tracks for a mile north and a mile south of this crossing were straight, and the view from the crossing in either direction was wholly unobstructed, if the persons in charge of the operation of the street car had not left their respective places therein, but had been in the exercise of even ordinary care. It is clear that they need not have attempted to cross on this particular occasion until it was safe so to do. It was, however, the duty of the conductor to precede the motor car upon the crossing, and after satisfying himself by looking north and south along the railroad tracks that the crossing was safe, to signal the motorman to come over. This duty it appears was required of him by the company, and by making this requirement we think the company was only in the exercise of the high degree of care which the law imposed upon it. The conductor who undertook to discharge this duty on this occasion had been running on that line for about a year. He was familiar with this crossing, and used it as many as eight times every day. The conductor on the trailer and the motorman were each likewise familiar with the crossing. The motor car reached a point on its track about fifteen feet west of the western railway track, and stopped to allow the south-bound train to pass on the western track. After that train had passed the conductor, while the motor car was still at rest, walked across the west railroad track, then across the

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east railroad track. He then signaled the motorman to come over, and the latter obeyed. The motor car had passed over both railroad tracks and the trailer was crossing the east railroad track when it was struck about midships by a north-bound freight engine, hauling a train of about ninety cars on the east railway track. This railway train was running at a rate of speed variously estimated at from eighteen to thirty miles an hour. The result of the collision was an appalling wreck. Nine passengers on the street car train were killed, and many severely injured, including the plaintiff. The trailer car was derailed, and overturned, and the freight engine, after having run about two hundred and fourteen feet north of the crossing, was derailed and ditched.

It is true that the operatives of the street car did not control the operation of the north-bound railway train, but it was their duty to exercise the utmost care, skill, and foresight in the operation of the street car train and theirs was the sole right and duty to so control the operation of that train that it would not attempt to occupy the crossing except when it was safe so to do. The operatives of the street car had the right of selection as to the time when the street car would attempt to make the crossing. There was no exigency requiring them to attempt a crossing when it was unsafe. There was no *vis major* on the street capable of compelling them to attempt an unsafe crossing, or threatening the safety of their passengers in the event of failure to make such an attempt at the particu-

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lar time. The fear that the street car train might not reach its destination according to schedule did not justify crossing at the time it was attempted. The existence of the intersection of the railway tracks was an admonition of danger; a warning that either a north or south bound train might be expected to use the crossing at any time.

It is no exculpation to say that the smoke and dust which followed in the wake of the south-bound train so obscured the north-bound freight that it could not be seen by the conductor. Such a condition of the atmosphere called for additional caution on his part; he should have withheld his signal to the motorman until he had sufficient evidence that the crossing was safe. In a case where a plaintiff was seeking damages for injuries received while he was driving on the track of a street railway in Memphis, at night, when darkness and dust made it impossible for him to see or be seen at a greater distance than thirty or forty feet, and his injuries resulted from a collision with a street car moving toward him at thirty miles an hour, it was held that he could not recover, because of his lack of ordinary care. *Railroad v. Roe*, 118 Tenn. (10 Cates), 601, 102 S. W., 343.

Nor is it a sufficient answer to say that the conductor could not hear the noise of the approach of the north-bound freight because of its commingling with noise from the south-bound freight. He knew the south-bound freight had just passed; he saw and heard it pass; he was bound to take notice of the danger that it might as

it did pass a north-bound freight only a few hundred feet south of the crossing, and that he would be unable to distinguish the noise of one from that of the other. If he had waited only a very short time he could not have failed to make the distinction and to hear the roar from the north-bound freight as it bore down upon the crossing. Whether a bell was rung, or a whistle blown, or not, common knowledge and the least bit of common sense, aside from special training and observation, should have suggested to him that he withhold his signal until he could determine by hearing, if not by sight, whether the crossing could be made in safety.

The considerations mentioned irretrievably stamp negligence upon the conduct of this servant of the company. The facts to which we have referred are not in dispute upon them alone. A directed verdict for liability in some amount was maintainable. When all the evidence was in there was indeed no question for the jury on the question of negligence. The only matter which should have been submitted to the jury was the amount of damages to which plaintiff was entitled.

Whatever may be said of the charge, it was more favorable to defendant than it might have been if the trial court *mero motu* or on motion of plaintiff had directed a verdict in his favor, and submitted the cause to the jury only on the amount of the damages.

Whether the railroad company was or was not in any manner negligent in the operation of the colliding north-bound train we do not consider material. However great its negligence may have been, no harm would

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have come to plaintiff if defendant's conductor had kept the street car clear of the sweep of the railway train. Plaintiff's injuries were the direct and proximate result of the failure of the conductor to discharge his duty. It was a breach of the high degree of care required of defendant for its servants to enter on the crossing; if, at the time, their view of the railroad track north or south were in any manner obstructed by the recent passage of the south-bound train, they should have waited until such obstructions were removed. Indeed it was a lack of ordinary care not so to do. *Wallenburg v. Missouri P. R. Co.*, 86 Neb., 642, 126 N. W., 289, 37 L. R. A. (N. S.), 135, and cases cited in note, subdivisions B and C. See, also, *New York & H. R. R. Co. v. Maidment*, 168 Fed., 21, 93 C. C. A., 413, 21 L. R. A. (N. S.), 794, and *Brommer v. Penn. R. Co.*, 179 Fed., 577, 103 C. C. A., 135, 29 L. R. A. (N. S.), 924.

The first assignment of error is overruled.

The second, third, fourth and fifth assignments of error each rest on the predicate that the court erred in declining a special instruction. The questions made by them are that the conductor of the street railway train had the right to assume that those in charge of any approaching railway train would exercise reasonable care, etc., and that the railroad locomotive would be equipped with a proper headlight that could be seen, etc., and would sound a warning, and that under chapter 46, Acts 1871, it was the duty of those in charge of the north-bound train to stop the same before crossing the track of the Memphis Street Railway Company.

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To sustain any one of the foregoing assignments of error would be to unsay all we said in our discussion of the first assignment. Whether a passenger on becoming such contracts for it or not by express terms the law by implication and on grounds of public policy burdens a carrier of passengers with the high degree of care we have mentioned, *supra*, and it does not allow that the carrier may escape the burden by shifting it to other shoulders than his own. Whether those in charge of the north-bound freight were negligent or not the street car company is not relieved of liability to the passenger for damages caused by the negligent management of its train. See *Parker v. Des Moines City R. Co.*, 153 Iowa, 254, 133 N. W., 373, Ann. Cas., 1913E, 174, and cases cited in note; *Vincennes Traction Co. v. Curry* (Ind. App.), 109, N. E., 62, 9 Neg. and Com. Cas., 933, and note.

The only remaining assignment is that the amount allowed by the verdict as damages was so grossly excessive as to evince passion, prejudice, or caprice on the part of the jury. We have examined the evidence on this point, and in our opinion the assignment is without merit.

We find no error in the judgment of the court of civil appeals.

Special Judges GHOLSON and SWIGGART took no part in the decision of this cause.

Judgment affirmed at petitioner's cost.

Bowker v. Mercantile Co.

BOWKER v. BRY-BLOCK MERCANTILE Co. *et al.*

(*Jackson*, April Term, 1916.)

LIBEL AND SLANDER. Words imputing larceny.

In slander action it was error to direct a verdict for defendant on the ground he had not imputed larceny to plaintiff, where he roughly said to plaintiff, a customer in his store, in the presence of others, that a hat was stolen from the store, that the hat on her head looked very much like it and was the hat, that he had been trying to locate the hat for some time by detectives, and they had located it on her head, and she replied that she had never been accused of stealing before, and no denial of the meaning of his words as defined by this reply was made by him.

Case cited and approved: *Cheatham v. Patterson*, 125 Tenn., 437.

Cases cited and distinguished: *Fields v. State*, 46 Tenn., 526; *Hughes v. State*, 27 Tenn., 76; *Bank v. Boudre*, 92 Tenn., 740; *Ouslow v. Horne*, 3 Wils., 177.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—H. W. LAUGHLIN, Judge.

HUNTER & WILSON and BANKS, BOALS & HARRELSON,
for plaintiff.

HIRSH & GOODMAN, for defendants.

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MR. SPECIAL JUSTICE GHOLSON delivered the opinion of the Court.

This is a suit for slander brought by the plaintiff, Mrs. W. F. Bowker, against the Bry-Block Mercantile Company, a corporation, and I. D. Block, who was its vice president, in the circuit court of Shelby county. At the conclusion of the testimony of the plaintiff a motion for a directed verdict was sustained by the circuit judge, from which an appeal was prayed and granted to the court of civil appeals. That court reversed and remanded the case, and it is now here upon petition for *certiorari* on the part of the defendants below.

The testimony shows that the plaintiff, Mrs. Bowker, who lives in Memphis, and who had been personally acquainted with the defendant I. D. Block for several years (two of her children having worked in the store of the defendant company), on Saturday afternoon, June 27, 1914, went into the store of said company and was seated upon a stool and being waited upon at the counter of the pattern department; that the defendant corporation conducted a large department store, with several hundred employees; that the defendant I. D. Block approached Mrs. Bowker and roughly touched her on the shoulder and said he wanted to see her a moment. He took her two or three steps over in the main aisle of the store, and in the presence and hearing of two men said to her:

"A hat was stolen from this store some time ago, and the hat you have on your head looks very much

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like the hat, and is the hat. These men are my detectives. I have had them trying to locate the hat for some time, and they have located it on your head, and that is the hat."

Mrs. Bowker then said to Mr. Block that she had never been accused of stealing before. Thereupon Mr. Block told her to go on and finish her shopping, and Mrs. Bowker stated that she had some change coming to her from the saleslady at the pattern counter which she would get and never do any more shopping in his store. Mr. Block then asked her where she got the hat she had on. She replied that she had purchased it at that store and paid \$9.98 therefor. He asked from whom she purchased it, and if she could identify the clerk, to which she replied that she had purchased it several months before from a lady clerk, but she could not identify her, as she did not know her.

When this conversation took place a large number of people were in the store, some of whom were within two or three feet of Mr. Block, Mrs. Bowker, and the two detectives, and within hearing distance of what was said.

Immediately after this conversation Mrs. Bowker went back to the pattern counter, got her change, and one of the detectives in whose presence I. D. Block had made the statement set out above came and asked for her name and address, said he assumed that she wanted to wear the hat home, as the next day was Sunday, and that he would be down Monday morning for it, to which she replied: "All right and I will show you the best

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time you ever had." The detective did go to her house on Monday and Tuesday for the hat, but she was not at home, and on Wednesday he went again to her house, saw her and demanded the hat, which she declined to give him, and referred him to her lawyer.

The declaration of the plaintiff below contained three counts and set out the words spoken by I. D. Block to her, quoted above. It also contained an *innuendo* that the defendants by the words quoted in the testimony of Mrs. Bowker imputed to her the crime of larceny. The defendants pleaded not guilty.

It was conceded by the parties that, if the meaning of the words used by I. D. Block imputed to the plaintiff the crime of larceny, they would be slanderous *per se*, and that it would have been error to peremptorily instruct for the defendants. Plaintiff contends that the words meant to impute said crime, or at least that this was a question for the jury. The defendants contend that the words did not impute to her the crime of larceny; furthermore, that the words are not ambiguous, either on their face or by reason of extraneous facts, and hence that the meaning of the words should not have been submitted to the jury.

"Larceny" (as defined in this State in the cases of *Fields v. State*, 6 Cold., 526, and *Hughes v. State*, 8 Humph., 76) "is the felonious taking and carrying away the personal goods of another. . . . Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and if unexplained, either by direct evidence or by the at-

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tending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive."

"Words are now to be construed by courts in the plain and popular sense in which the rest of the world naturally understood them. In all cases of ambiguity it is purely a question for the jury to decide what meaning the words would convey to persons of ordinary intelligence." *Bank v. Bowdre*, 92 Tenn., 740, 23 S. W., 131, and authorities there cited.

Where the language published is unambiguous, it is the exclusive province of the court to determine its construction, and to determine whether or not upon its face it is actionable *per se*. *Bank v. Bowdre*, *supra*.

"The question always is: How did the persons to whom the words were originally spoken or published understand them?—the legal presumption being that they were persons of ordinary intelligence. We must assume too, that they give to ordinary words their ordinary meaning; to local or technical phrases their local or technical meaning. That being done, what did the whole passage convey to the unbiased mind?" Newell's *Slander & Libel* (3d Ed.), section 367.

In the opinion of Judge Lansden in the well-considered case of *Cheatham v. Patterson*, 125 Tenn., 437, 145 S. W., 159, Ann. Cas., 1913C, 314, there is quoted with approval the following language of Chief Justice De Gray in *Onslow v. Horne*, 3 Wils., 177:

"The rule is that the words must contain an express imputation of some crime liable to punishment, some

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capital offense, or other infamous crime or misdemeanor, and the charge upon the person spoken of must be precise."

Now, applying the rules under the authorities above referred to, what was the meaning of the language used by Block to Mrs. Bowker?

The statement was made by Block that a hat had been stolen from the store of defendant company; that the hat which she (Mrs. Bowker) had on looked like the stolen hat, and was the hat; that the detectives whom he had employed for some time had been trying to locate the hat, and had located it on her head.

Can there be any doubt but that Block in precise and exact terms charged that the crime of larceny of the hat had been committed, and that the property found in the possession and upon the person of Mrs. Bowker was the same that had been stolen from said store? Did he not in this charge make out a *prima facie* case of larceny by Mrs. Bowker in having in her possession stolen property? Did not those who heard this charge understand the language used by him in speaking to her to mean that he charged her with the larceny of the hat?

The detectives employed by Block are shown by the evidence to have heard the conversation. Customers in the store and employees in all probability heard it. In the light of the testimony quoted, there is no doubt as to how Mrs. Bowker understood it, because her reply was that she had never been accused of stealing before. No denial of his meaning as defined by her was

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made by Block. There can be no doubt as to how one of the detectives in whose presence the conversation took place understood this meaning, because he took her name and address and said that he would be at her house on the following Monday to get the hat; and, as stated before, he did go to her residence for the hat on Monday, Tuesday, and Wednesday.

We think the court of civil appeals was clearly right in reversing and remanding the case, and the petition for *certiorari* is denied.

Prater v. Riechman.

PRATER v. RIECHMAN, Sheriff. *

(*Jackson*. April Term, 1916.)

EXEMPTIONS. Statutes. Construction.

Under Shannon's Code, section 3794, exempting in the hands of every male citizen, and every female head of a family, two horses or mules, together with wagons, harness, and saddles, etc., an automobile is not exempt; it being property entirely dissimilar to that exempted and used by a different class of citizens from those intended to be protected by the exemption statute.

Cases cited and approved: *Cox v. Ballentine*, 60 Tenn., 363; *Wolfenbarger v. Standifer*, 35 Tenn., 659; *Hawkins v. Pearce*, 30 Tenn., 44; *Webb v. Brandon*, 51 Tenn., 285; *Simons v. Lovell*, 54 Tenn., 510; *Lames v. Armstrong*, 162 Iowa, 327.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—J. P. YOUNG, Judge.

B. F. BOOTH, for plaintiff in error.

CHAS. M. BRYAN, for defendant in error.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

Dr. Prater was a practicing physician residing in Memphis, a married man, and the head of a family. He

*For authorities on the question of exemption of automobile from seizure for debt, see note in 49 L. R. A. (N. S.), 691.

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owned a two-seated runabout automobile, valued at not less than \$100, which he used in calling upon his patients in and out of the city. He also frequently hauled groceries and other small articles in the automobile. He owned no horse or buggy, or other vehicle.

The sheriff, having in hand an execution at law against him, levied the same on the automobile, and Prater brought an action of replevin, claiming the property to be exempt under Shannon's Code, section 3794. The circuit court, and the court of civil appeals, held against the claim of exemption, and Prater now invokes our judgment of the question by his petition for *certiorari*.

By the legislation above referred to, it is declared that there "shall be exempt from execution, seizure, or attachment in the hands of every male citizen of the age of eighteen years and upward, and every female who is the head of a family" (here follow certain articles and provisions which we need not mention), "two horses, or two mules, one horse and mule, or one horse or mule, and one yoke of oxen; one ox-cart, yoke, ring, staple, and log chain; one, two, or one one-horse wagon (not to exceed \$75 in value), and harness; one man's saddle; one woman's saddle; two riding bridles."

The public policy underlying our exemption statutes for heads of families is that a creditor should be restrained from having satisfaction of his debt out of certain kinds of property which are necessary to the maintenance of the families of improvident or unfortunate debtors; authorities: *Cox v. Ballentine*, 60 Tenn.

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(1 Baxt.), 363; *Wolfenbarger v. Standifer*, 35 Tenn. (3 Sneed), 659; *Hawkins v. Pearce*, 30 Tenn. (11 Humph.), 44; *Webb v. Brandon*, 51 Tenn. (4 Heisk.), 285; *Simons v. Lovell*, 54 Tenn. (7 Heisk.), 510.

The schedule of exempt articles under section 3794, Shannon's Code, many of which are not mentioned above, embraces such as were, at the time of the legislation, in common use among the class of debtors for whose protection the statute was enacted. The animals and vehicles named in the schedule are such as were usually owned by such debtors and used by them in the work necessary to be done to support their families, and to accomplish such limited transportation of themselves and their families as might be necessary. An automobile, on the other hand, is an invention not in use when the exemption statute was passed, and so of course is not mentioned therein, and was not within the intent of the legislature. The automobile is the product of a civilization advanced much beyond the date of our exemption legislation; and it is as a means of transportation, a different class of vehicle altogether from those named in the statute. It was invented to meet the needs of a different class of citizenship from that intended to be protected by the exemption statutes. It is a vehicle whose owner is usually well able to pay his debts, and, whether willing or not so to do, should be thereto compelled.

Petitioner relies on *Lames v. Armstrong*, 62 Iowa, 327, 144, N. W., 1, 49 L. R. A. (N. S.), 691. In that case an insurance agent was held to be a laborer and an au-

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tomobile a vehicle, within the purview of the statute there under consideration. But our statute is so different in its phraseology that we find the Iowa case of no value as authority.

An automobile is property so entirely dissimilar in kind from any of the articles named in our exemption statutes that it cannot be held to be embraced therein, unless we should depart from legitimate construction and engage in judicial legislation.

There was no error in the judgment of the court of civil appeals, and the writ of *certiorari* is accordingly denied.

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AMERICAN EXPRESS CO. v. SAM FOX.

*(Jackson. April Term, 1916.)***1. INJUNCTION. Foreign courts. Injunction against proceedings. Relief. Equitable remedies.**

The courts of the forum may restrain a citizen of the State of the forum from prosecuting a suit against a citizen of the same State in a foreign State. (*Post*, pp. 490, 491.)

Cases cited and approved: *Lockwood & Co. v. Nye*, 32 Tenn., 515; *Dehon v. Foster*, 4 Allen (Mass.), 545; *Cole v. Cunningham*, 133 U. S., 107; *Jones v. Hughes*, 156 Iowa., 684; *Freick v. Hinkly*, 122 Minn., 24.

2. INJUNCTION. Relief Right to.

Defendant, a resident of Tennessee, will not be enjoined from suing a complainant in the State of Mississippi on a cause of action arising in Tennessee, because it would be to complainant's convenience to be sued in Tennessee, or because the rules of law in Mississippi are slightly different, for probably the laws of Tennessee would be applied, and such an injunction should be granted only in a very special case, and not one merely where the practice in two States differed. (*Post*, pp. 491-494.)

Cases cited and distinguished: *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 74 N. J. Eq., 457; *Jones v. Hughes*, 156 Iowa, 684; *Cole v. Young*, 24 Kan., 435.

3. INJUNCTION. Relief. Right To.

The courts of the forum will not at the suit of a nonresident corporation which might remove a suit brought by a resident of the State to the federal courts, enjoin a resident from suing in a foreign State, for such corporation could not be compelled to submit to the jurisdiction of the local courts. (*Post*, pp. 494-498.)

Cases cited and approved: *Turcott v. Railroad*, 101 Tenn., 108; *Adams v. Chattanooga Co., Ltd.*, 128 Tenn., 505.

FROM SHELBY

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
FRANCIS FENTRESS, Chancellor.

American Express Co. v. Fox.

BURCH & MINOR and C. H. McKAY, for complainant.

W. G. CAVETT and H. S. BUCHANAN, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

Sam Fox, a citizen of Shelby county, Tenn., brought a suit for \$20,000 damages for personal injuries in a circuit court of that county, against the American Express Company, a New York corporation or joint stock company, having an office and place of business in Shelby county, Tenn. The accident happened in Shelby county. This suit was removed to the district court of the United States at Memphis on petition of the American Express Company. Before trial in the federal court, Fox took a nonsuit.

Three months later, Fox began a new action on account of the same matters in the circuit court of De Soto county, Miss., for \$3,000 damages.

This bill was filed by the American Express Company in the chancery court of Shelby county to enjoin the prosecution by Fox of his said damage suit in the circuit court of De Soto county, Miss. A demurrer was interposed by Fox, which was overruled by the chancellor and the injunction was granted as prayed. The court of civil appeals affirmed the chancellor's decree, and the case is before us on a petition for *certiorari*, which has been granted.

Notwithstanding a *dictum* to the contrary in *Lockwood & Co. v. Nye*, 32 Tenn. (2 Swan), 515, 58 Am. Dec., 73, we think there is no doubt that the courts of one State have the power in a proper case to restrain a citizen of that State from prosecuting a suit against another citizen of the same State in the courts of an-

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other State. This jurisdiction rests on the theory that the injunction operates *in personam* and is not an interference with the proceedings of the courts of a sister State. High on Injunctions (4th Ed.), sections 103-107; Story's Eq. Jurisp. sections 899, 900; Pomeroy's Eq. Remedies, section 670.

Two of the leading cases in America announcing this rule are *Dehon v. Foster*, 4 Allen (Mass), 545, and *Cole v. Cunningham*, 133 U. S., 107, 10 Sup. Ct., 269, 35 L. Ed., 538. In the last case it was held that such proceedings were not in derogation of section 1, article 4, of the Constitution of the United States providing that full faith and credit shall be given in each State to the judgments of another State.

This question has received elaborate consideration in recent years and the cases on the subject are collected and classified in notes in 10 Amn. Cas. 26, 21 L. R. A. 71, and 25 L. R. A. (N. S.), 267. Two recent cases are *Jones v. Hughes*, 156 Iowa, 684, 137 N. W., 1023, 42 L. R. A. (N. S.), 502; *Freick v. Hinkly*, 122 Minn., 24, 141 N. W., 1096, 46 L. R. A. (N. S.), 695. It appears, from an examination of the authorities referred to, that injunctions have been granted against suits in the courts of another State to prevent embarrassment, oppression, or fraud, to prevent evasion of domiciliary laws, where insolvency proceedings are pending, where the local court had prior jurisdiction, and perhaps other cases.

The decisions do not appear to be altogether agreed as to what circumstances justify such relief. It would be perhaps impossible to state a rule to which all the cases would conform. We are impressed with the idea that such injunctions have in some of the cases been improvidently granted.

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We indulge ourselves in quotations from the opinions of three eminent judges who have had occasion to consider this jurisdiction of courts of equity.

Chancellor Pitney, of New Jersey, observed:

“But on general principles, equity will not interfere with the right of any person to bring an action for the redress of grievance—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one State to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another State ought to be sparingly exercised. . . . They must be very special circumstances that will justify this court in restraining the prosecution of an equitable action already pending in a court of ample jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of that commonwealth; that it can weigh evidence better or more justly apply to the facts any general principle of law or equity, nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth.” *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 74 N. J. Equity, 457, 71 Atl., 153.

Chief Justice McClain of Iowa said:

“But, beyond the prevention of some threatened evasion of the specific laws of the State intended to regulate the relations of its citizens to each other in

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some definite manner, courts have been reluctant to interfere with the exercise of the undeniable right of a resident to go into the courts of another State to secure such relief as may there be available to him, and have not felt justified in scrutinizing his motive in doing so." *Jones v. Hughes*, 156 Iowa, 684, 137 N. W., 1023, 42, L. R. A. (N. S.), 502.

Judge Brewer, while on the supreme court of Kansas, used this language:

"The question is: Under what circumstances will a court of equity restrain a party from invoking the aid of the courts and processes of another State? It certainly will not do that, simply to compel him to carry on his litigations at home. It will not act upon the basis of any distrust of the courts of a sister State." *Cole v. Young*, 24 Kan., 435.

Tested by the rules expressed in the above quotations from these three learned jurists, we think that the bill of complaint does not state a case which entitles it to the relief here sought.

It is said for the complainant that it will be unable to compel the attendance of any of its witnesses in the Mississippi court and unable to procure the attendance of some of them; that Fox's contributory negligence will only mitigate his damages in Mississippi and will not bar his recovery there as it would in Tennessee; that in Mississippi all questions of negligence and contributory negligence must go to the jury, while in Tennessee a defendant is entitled to peremptory instructions as to these matters, under certain circumstances. Other

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reasons are set out why it would be more convenient for the complainant, and more to its advantage, to have Fox's damage suit tried in Tennessee. While some of the decided cases would apparently justify an injunction in favor of the complainant, we do not think it entitled to such relief on the showing it has made. So far as we can see, every defense available to the American Express Company against this damage suit in Tennessee will likewise be available to it in Mississippi. The accident occurred in Tennessee, and Tennessee law will doubtless be applied. The fact that the procedure in Mississippi differs somewhat from procedure in Tennessee does not authorize the exercise of the jurisdiction invoked. We cannot doubt that justice will be administered in the Mississippi courts, nor would we feel authorized in restraining the suit in Mississippi merely because it is more convenient for the complainant to litigate such matters in Tennessee, or because our practice may be more favorable to it. It may be more convenient for Fox to litigate in Mississippi, and more to his advantage. We see no evidence of fraud or oppression, nor any attempt to evade domiciliary laws.

What we have heretofore said, however, is not absolutely necessary to a decision of this case. Such injunctive relief as is here sought by the complainant, in all the cases to which our attention has been called, has been accorded to citizens of a particular State in proceedings against citizens of the same State. We know of no case, reaching a court of last resort, where an

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injunction has been issued in behalf of a nonresident by the courts of any State to restrain a citizen of that State from suing the nonresident in another State.

We are not aware that this identical question has heretofore arisen, but we think there are very good reasons why the jurisdiction invoked should not be exercised in favor of a nonresident, at least in a case involving such facts as the present one.

We pass the suggestion that the courts of a given State have enough to do when they protect the rights of their own citizens and citizens of other States within their borders. It is obvious, however, that our citizens should not be restrained from asserting their rights against any person in other forums, and compelled to litigate with such person in our own courts, unless we can also restrain that person from litigating elsewhere, and force him to yield to the jurisdiction of our courts.

From the statement of the case, it appears that the American Express Company has not been willing to submit its rights to the courts of Tennessee in the matter of Fox's claim for damages. Fox first sued the complainant in the circuit court of Shelby county, and the complainant—the defendant in that suit—forthwith removed the case to the federal court. If we enjoin Fox's suit in Mississippi and he brought another suit in the Tennessee courts for more than \$3,000 or for \$20,000, we would be utterly without power to compel the American Express Company to surrender to this jurisdiction. It would be entitled by reason of diverse

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citizenship to remove the controversy to the courts of the United States, and judging from its previous course, the American Express Company would do that very thing.

If the case were removed to the federal court, Fox would be inconvenienced in certain particulars, just as the complainant claims it will be inconvenienced by the suit in Mississippi. The *quantum* of evidence necessary to take the case to the jury is greater in the federal courts than in the Tennessee courts. The fellow-servant rule has broader application in the federal courts. Proceedings in the federal courts are more expensive and cannot be carried on upon the oath of a poor person.

It is true that inasmuch as the complainant has qualified to do business in Tennessee, it is a resident of Tennessee for certain purposes. *Turcott v. Railroad*, 101 Tenn., 108, 45 S. W., 1067, 40 L. R. A., 768, 70 Am. St. Rep., 661; *Adams v. Chattanooga Co., Ltd.*, 128 Tenn., 505, 161 S. W., 1131. The American Express Company, nevertheless, is still a resident of the State of New York for jurisdictional purposes, so as to enable it to remove this controversy to the courts of the United States.

Inasmuch, therefore, as we would be unable to compel the complainant to submit to our jurisdiction, should we enjoin Fox's suit in Mississippi, we must decline for that reason, if for no other, to grant the relief here sought. The result would be an injustice to a citizen of this State. It would force him without doubt

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to suffer much of the very trouble and inconvenience which the complainant seeks to obviate for itself.

The decree of the court of civil appeals and the decree of the chancellor will be reversed, and the bill dismissed at complainant's cost.

ON PETITION TO REHEAR.

A petition to rehear is filed, which points out that the case was submitted on demurrer to the complainant's bill, and challenges the accuracy of the statement in the opinion that "no fraud or oppression nor any attempt to evade domiciliary laws" appears, on the part of defendant herein. If it be conceded that on the former hearing the court did not give adequate force to certain charges of the bill confessed by the demurrer, nevertheless the result must remain the same. As noted in the opinion, that portion criticized as just indicated was not "absolutely necessary to a decision of this case."

We remain unshaken in the belief that such an injunction as is herein sought should not be granted to a nonresident complainant under the circumstances appearing in this case. The observation in the opinion that litigation might not be pursued in the courts of the United States upon the pauper's oath was founded upon the practice that has prevailed therein within the knowledge of the writer. Our attention is moreover called to a rule of the federal district court for the Western Division of Tennessee, absolving the clerk of that court from the duty of docketing any case until

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the plaintiff makes a deposit to cover costs. Whether such practice and rule be authorized by federal law, it is not for us to say. This matter is not determinative of the controversy before us.

We are the better satisfied upon reconsideration that we properly decided this case, and the petition to rehear is dismissed.

Pappas v. State.

PETER PAPPAS v. THE STATE.

(Jackson. April Term, 1916.)

1. SALES. Conditional sales. Recovery of property. Failure to resell. Effect.

Where the seller of goods on conditional sale retook the goods, title to which was retained in him after they were removed from the State, his failure to resell them, as required by the conditional sales law, canceled the debt against the original purchaser. (*Post*, pp. 500, 501.)

2. SALES. Conditional sales. Criminal responsibility for transfers. Statutes. Construction. "Knowingly or willfully."

Laws 1909, ch. 557, sec. 1, making it unlawful to remove from the State any personalty, title to which was retained at time of sale, unless written consent of the seller is obtained, having omitted the words "knowingly" or "willfully," does not require intent to defraud as an element of the offense, but the bare removal, even if in good faith, constitutes the offense. (*Post*, pp. 501-508.)

Acts cited and construed: Acts 1909, ch. 557.

Cases cited and approved: *Debardelaben v. State*, 99 Tenn., 649; *Duncan v. State*, 26 Tenn., 148; *Haggerty v. St. L. Ice Mfg. Co.*, 143 Mo. 238; *State v. Foster*, 22 R. I., 163.

Case cited and distinguished: *Halsted v. State*, 41 N. J. Law, 552.

FROM SHELBY

Appeal from the Criminal Court of Shelby County.
—JESSE EDINGTON, Judge.

Pappas v. State.

FRIEDMAN & ROSENSTEIN, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney-General
for the State.

MR. GHOLSEN, Special Judge, delivered the opinion
of the Court.

The plaintiff in error, hereinafter called the defendant, was convicted of removing beyond the limits of the State of Tennessee personal property, the title to which had been retained in another at the time of his purchase thereof, without the consent of the seller of said personal property in writing. He has appealed and assigned errors.

It is shown that the property described in the indictment was purchased by the defendant by a written contract of conditional sale, which expressly prohibited the defendant from removing the property from the State, without the written consent of the seller, and that notwithstanding the statute, and notwithstanding the contract, the defendant did carry the property to the State of Arkansas, where it was recovered and brought back by the agents of the seller. The defendant testified that he was a Greek, could read and understand but little English, and that he did not know that he had no right to carry the property to Arkansas. The reason given by him for going, and carrying said property out of the State, was that he could do no business in Memphis, and he claimed that it was his purpose to remit from Arkansas, and meet the unpaid installments on

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the property purchased by him as they fell due. The property was recovered before any default in payment had been made, the seller having learned of the defendant's departure from the State before another payment was due. Upon recovery of the property by the seller, it was not sold as required by the conditional sales law, and therefore, he has no further debt against the defendant.

It is contended by the learned counsel for the defendant that the trial judge was in error in instructing the jury that if the defendant bought the property described in the indictment under a conditional bill of sale, and left this State and went to Arkansas with the property, without the written consent of the seller, he would be guilty as charged in the indictment. The further contention is made that the trial judge was in error in refusing a request by the defendant that the jury must find that the defendant removed the property from this State with the intent to defraud the seller, and that if they should have a reasonable doubt of the existence of fraudulent intention on the part of the defendant in removing the property to Arkansas, the jury must acquit him.

The first section of chapter 557 of the Acts of 1909, under which defendant was convicted, is as follows:

"Sec. 1. Be it enacted by the General assembly of the State of Tennessee, that it shall be unlawful for any person to remove beyond the limits of . . . Tennessee any personal property, the title to which has been retained at the time of the sale thereof, unless the

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consent of the seller of such article be obtained in writing prior to the time that such removal of such article is made beyond the limits of the State of Tennessee. Any person violating this section shall be deemed guilty of a felony, and, upon conviction thereof, shall be imprisoned for not less than one year nor more than five years, and fined not less than two hundred and fifty dollars (\$250) nor more than five hundred dollars (\$500)."

There is no evidence in the record showing that said property was removed from this State with the intent upon the part of the defendant to defraud the seller, and the question is squarely presented whether it was necessary for the State to show such fraudulent intent upon the part of the defendant.

The legislature may enact laws for the mere violation of which, irrespective of the criminal intent, penalties are attached; as, for selling liquor to minors, selling adulterated food and drugs, allowing minors to frequent saloons, changing and obstructing public roads, maintaining a nuisance, and disposing of mortgaged property. 8 Am. & Eng. Enc. Law (2d Ed.), 291, and authorities cited.

"As a general rule where an act is prohibited, and made punishable by statute, the statute is to be construed in the light of the common law, and the existence of a criminal intent is essential. The legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent of the doer, and if such an intention appears, the court must

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give it effect, although the intention may have been innocent. Whether or not in the given case a statute is to be so construed is to be determined by the court, by considering the subject-matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the legislature." 12 Cyc., 148.

Among other authorities there cited are *Debardelaben v. State*, 99 Tenn., 649, 42 S. W., 684, and *Duncan v. State*, 7 Hump., 148.

It is the general rule of construction that when a statute makes criminal an act not *malum in se*, or infamous, without requiring the act to be knowingly or willfully done, a criminal or fraudulent intent is not an element of the offense, and need not be proved. Ruling Case Law, vol. 8, title, Criminal Law, sec. 12; *Halsted v. State*, 41 N. J. Law, 552, 32 Am. Rep., 247; *Haggerty v. St. L. Ice Mfg. Co.*, 143 Mo., 238, 44 S. W., 1114, 40 L. R. A., 151, 65 Am. St. Rep., 647; *State v. Foster* 22 R. I., 163, 46 Atl., 833, 50 L. R. A., 339; note, vol. 11 L. R. A., 807.

The rule and the reason thereof is well stated in Ruling Case Law, *supra*, as follows:

"Guilty Intent as Element of Statutory Crime. The maxim, '*Actus non facit reum nisi mens sit rea*,' does not always apply to crimes created by statute, and therefore if a criminal intent is not an essential element of a statutory crime, it is not necessary to prove any intent in order to justify a conviction. Whether a criminal intent or guilty knowledge is a necessary ele-

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ment of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design. There are many instances in recent times where the legislature in the exercise of the police power, has prohibited, under the penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute. It is equally true that in some cases, when the prohibition in a statute against doing a certain act or series of acts is couched in general terms, courts have imported into the statute a proviso that the denoted act shall be done from a guilty mind. These two classes of cases, diverging as they do and seemingly standing apart from each other, may at first view appear to be irreconcilable in point of principle; nevertheless such is not the case. They all rest upon one common ground, and that ground is the legal rules of statutory construction. Each set of cases is or should have been the result of the judicial ascertainment of the mind of the legislature in the given instance." Ruling Case Law, vol. 8, title, Criminal Law, sec. 12, pp. 62-3.

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The case of *Halsted v. State*, supra, contains an able discussion of the subject by the supreme court of New Jersey, and from that we make the following quotations:

"Nothing in law is more incontestable than that, with respect to statutory offenses, the maxim that crime proceeds only from a criminal mind does not universally apply. The cases are almost without number that vouch for this. The defendant in this case pleads that he was ignorant of the law as applied to the facts involved in his conduct. But it has been many times decided, and indeed is the admitted general rule, that ignorance of the law is no defense against a criminal charge. . . .

"A man" as remarked by Earle, C. J., "cannot be said to be guilty of a *delicti* unless, to some extent, his mind goes with the act. And the first observation which suggests itself in limitation of the principle thus enunciated is that whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it willfully, or in some cases, even ignorantly, or, maybe, to effect an ulterior laudable object; and consequently the doing of it may form the subject-matter of an indictment, or other legal proceeding *simpliciter*, and without the addition of any corrupt motive."

"As there is an undoubted competency in the law-maker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power

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to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention. And in looking over the decided cases on the subject it will be found that in the considered adjudications, this inquiry has been the judicial guide."

It being clear that in statutory offenses a criminal intent or fraudulent intent is not always essential, it is equally clear that whether the scienter is a material element of the crime or not must be determined by the language used by the legislature in defining the offense.

In the statute under consideration the words "willfully" or knowingly" are nowhere to be found. These are the usual words used by the lawmaking power when it is contemplated by them that the intention of the person violating the statute should be considered as a material element. A holding that there must be a fraudulent intent in this offense would be to render nugatory several important clauses in the statute. The statute not only stipulates that the consent of the owner be obtained in writing, but also that it must be obtained prior to the time of the removal. Neither of these provisions would be effective if it were necessary to show a fraudulent intent on the part of the accused in order to convict him, when it was shown that he had taken the property in question from the State without the consent of the seller or holder of the legal title.

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It is evident that it was the purpose of the legislature, not only to protect the conditional vendor from ultimate loss of the property sold on a conditional sale, but to secure to him a knowledge of the whereabouts of the property, so that if default be made in any payment, he would be enabled to readily regain possession of the property and enforce his legal rights. It is apparent that he would be greatly hampered if it were necessary for him to search the United States for his property, and that there was a logical and reasonable end to be secured by the enactment that such property should not be removed without the written consent of the seller of the property, first had and obtained. It would defeat the ends of the statute to construe it as contended by learned attorneys for the defendant.

The laws of our State have long recognized the validity of conditional sales, where, in many instances, the principle, if not the only security to the vendor, is the retention of title to the property sold. Much valuable property has been thus dealt with, such as live stock, farm implements, machinery, vehicles, furniture, etc. It is an easy and cheap method of doing business, and in many places it has grown to large proportions. Much of the property thus transferred can be easily and quickly removed to other States, especially as Tennessee is a long narrow State bounded by eight other States, in which there may be no protection whatever, under the laws of such States, for the rights of conditional vendors. Evidently these conditions were considered by the legislature when this act was passed. No

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sound reason has been given why it should not be enforced. The judgment is therefore affirmed.

But we do not mean to hold that the mere carrying of such property out of the State, temporarily, or incidentally in the ordinary, and contemplated use of it, by the conditional purchaser, without any purpose of permanently removing it beyond the limits of Tennessee, would constitute an offense under this statute.

However, it appearing that the defendant has been imprisoned several months already; that he had paid all installments that fell due before the property was removed; that the seller has recovered the property and no longer has any claim against the defendant; that the latter was ignorant and probably intended no wrong—we recommend that the Governor pardon him, as we believe he has already been punished enough.

In the foregoing opinion we have quoted liberally from the able brief of the learned assistant attorney general, and feel that due credit should be given.

PARKER-HARRIS CO. v. T. G. TATE, Sheriff.

(Jackson. April Term, 1916.)

1. LIENS. Conditional sales. Lien for automobile injury. Priorities. "Deodand."

The lien on an automobile, given by Laws 1905, ch. 173, sec. 5, to a person injured thereby in collision, is inferior to a conditional vendor's rights therein fixed before the collision, and only the interest of the vendee is subject to such lien; and the doctrine of "*deodand*" (by which is meant the forfeiture of a personal chattel, animate or inanimate, becoming the immediate instrument causing death) does not apply, especially in view of Const. art. 1, sec. 12, providing that "If any person be killed by casualty, there shall be no forfeiture in consequence thereof;" and since the legislative policy has been consistently to protect the lien for the price. (*Post*, pp. 511-516.)

Acts cited and construed: Acts 1905, ch. 173.

Cases cited and approved: *Leach v. Asman*, 130 Tenn., 510; *Newbrand v. Kraft*, L. R. A. 1915D, 693.

Constitution cited and construed: Art. 1, sec. 12.

2. LIENS. Statutory. Priorities.

A lien created by statute does not take precedence of a prior contractual lien, unless such is the clear intention of the statute, even when the statutory lien is for work done on or to the betterment of the property in question. (*Post*, pp. 516, 517.)

Cases cited and approved: *Wilson v. Donaldson*, 121 Cal., 8; *Adler v. Godfrey*, 153 Wis., 186; *Reeves & Co. v. Russell*, 28 N. D., 265; *Shaw v. Webb*, 131 Tenn., 173; *Horace Waters Co. v. Gerard*, 189 N. Y., 302.

3. LIENS. Statutory.

A statutory lien has only such force as the statute gives it, and the superseding or subordinating of an earlier lien, by the

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statute creating a lien, should not easily be inferred, especially where the statutory lien is not awarded for service adding value to or preserving the property in question. (*Post*, pp. 517, 518.)

Cases cited and approved: *Hanch v. Ripley*, 127 Ind., 151; *McDaniel v. Osborn*, 166 Ind., 1.

4. LIENS. Priorities.

In the absence of express statute to the contrary, liens take precedence in the order of time. (*Post*, pp. 518-520.)

Acts cited and construed: Acts 1897, ch. 78.

Case cited and distinguished: *Des Moines Brick Co. v. Smith*, 108 Iowa, 307.

Code cited and construed: Secs. 3533, 3536, 3569, 3585.

5. LIENS. Statutes. Construction. "Owner."

Where the same word used in a statute more than once, and the meaning is clear at one place, it will ordinarily be construed to have that meaning elsewhere in the act, and the word "owner," as used in Laws 1905, ch. 173, refers to the conditional vendee who has control and use of the automobile, and not to the conditional vendor. (*Post*, pp. 520-522.)

Cases cited and approved: *Bank v. Vandyck*, 51 Tenn., 617; *Marion Mfg. Co. v. Buchanan*, 119 Tenn., 238; *Lehman v. Ferrell*, 71 Ala., 458; *Montgomery v. Rich*, 3 Tenn. Ch., 660; *Pierce v. Lawrence*, 84 Tenn., 572.

Cases cited and distinguished: *Daugherty v. Thomas*, 174 Mich., 371; *Samson v. Aitchison*, (1912), A. C., 844; *Wynne v. Dalby*, 30 Ont., 67; *Goff v. Byers*, 70 Neb., 1; *Waggoner v. St. John*, 57 Tenn., 503.

FROM SHELBY

Appeal from the Circuit Court of Shelby County—
H. W. LAUGHLIN, Judge.

Parker-Harris Co. v. Tate.

BACON & STICKLEY, for appellant.

BELL, TERBY & BELL, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The sole question for determination is one of law: Is the lien on an automobile, given by Acts 1905, chapter, 173, to the person injured thereby in a collision, superior to the rights of the conditional vendor of the machine fixed at a date prior to the infliction of the injuries but after the passage of the legislative act?

The court of civil appeals has answered in favor of the claim of the person injured. We hold to the contrary.

The case was tried in the court below on an agreed statement of facts which, in substance, was:

The plaintiff company is an automobile dealer in Memphis, and sold to one Richardson a machine for which the latter paid part cash and executed notes to represent the remainder, title to the automobile being retained by the vendor by a provision in the face of the note.

Later, while driving the automobile, Richardson ran over and killed a little negro boy, whose administrator brought **suit against Richardson** to recover damages for the death. An attachment was issued and levied on the car under the provisions of the above act. The vendor company instituted this, a replevin suit, against the sheriff who had levied the writ of attachment; and

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it claimed the right of possession by reason of the title so retained by it.

The automobile act, above referred to, after requiring owners of cars to register and number the same and regulating the speed and operation thereof, sets out in section 5 as follows:

“That whenever any suit for damages is brought in any court for injuries to persons or property caused by the running of any automobile in willful violation of the provisions of this act, there shall be a lien upon such automobile for the satisfaction of such recovery as the court may award whether, at the time of the injury, such automobile was driven by the owner thereof or by his chauffeur, agent, employee, servant, or any other person using the same by loan, hire, or otherwise.”

The court of civil appeals proceeds as it states on the assumption that automobiles are dangerous instrumentalities. We have held that they are not to be classed with instrumentalities that are inherently dangerous. *Leach v. Asman*, 130 Tenn., 510, 172 S. W., 303, and authorities cited; and note to *Neubrand v. Kraft*, L. R. A., 1915D, 693, where numerous cases are collected.

We understand the statute to go upon the idea that these cars are not such instrumentalities, and therefore it merely denounces misuse or negligence in their operation. When there is a willful violation of the provisions of the statute, injuries are contemplated to accrue for which a recovery may be had. The legisla-

ture dealt with an instrumentality capable of producing harm when negligently operated; it therefore saw fit, and competently and properly, to regulate their operation.

The court of civil appeals, passing to a consideration of the claim of administrator to priority over the conditional vendor, refers for justification of its ruling to that doctrine of the common law, as administered in England, known as the doctrine of *deodand*. That court thus states the position:

“The legislators intended to make the claim of the injured one superior to that of any other person who asserts a lien or a charge, and that the claim of the injured one should be enforced against any owner who in any manner consented that the one who inflicts a harm might use the machine. It is clear that this was the legislative design. Did the legislature when it so provided go beyond any recognized principle of jurisprudence or of legislation? We can best answer this question by tracing the history and development of the idea of responsibility for injuries done by dangerous or *quasi* dangerous instrumentalities. This is known as the doctrine of *deodand*. Practical lawyers may scorn this method of treating of intricate questions if they want to. We are persuaded that this is the only broad, logical, and jurisprudential way of solving propositions that are now in the realm of debate. Analogy is still the great light, and history is a luminary of almost equal force. And it must not be forgotten that numberless rules of the ancient common

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law are operative to-day, and that juridical concepts are so persistent as to come to life and illuminate questions arising in ages far distant from their origin."

A "*deodand*" (a thing forfeited to God) was any personal chattel whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king, for sale and a distribution of the proceeds in alms to the poor by his high almoner, "for the appeasing of God's wrath," says Coke. At the base of the doctrine was superstition—the implication that the cart or the ox drawing it, for example, was morally affected from having caused the death. So far was this the case that Blackstone says that the forfeiture applied, even though the offending cart belonged to the person killed. 1 Blacks. Com., 301; Holmes, Common Law, 24; 2 Pollock & Mait., History of English Law (2d Ed.), 473.

The doctrine fitly belonged to an age in which an action for a death negligently or tortiously caused was not permitted against the culpable person of true moral responsibility. If, however, that person's vehicle was, though inanimate, the occasion of his own death, it was a *deodand* for pious uses. Needless to say, historians record that the "pious uses" under the control of the king and his almoner became a scandal which moderns would describe as being graft.

The doctrine, after being subtly refined and pared down, was discarded in England by Stat. 9 and 10, Victoria, Chapter 62. To the credit of American jurispru-

dence, from the outset the doctrine was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country.

In this State, we have a positive denunciation of its principle firmly embedded in the fundamental law. The Constitution of 1870 provides:

“No corruption of blood or forfeiture of estates; no *deodands*.—That no conviction shall work corruption of blood or forfeiture of estate. The estate of such persons as shall destroy their own lives shall descend or vest as in the case of natural death. If any person be killed by casualty, there shall be no forfeiture in consequence thereof.” Article 1, section, 12.

We are at a loss to understand why a doctrine, so discarded and denounced, was thought to buttress, by analogy or otherwise, the position so taken; and we are at an equal loss to understand how it sheds light on the law of dangerous instrumentalities when the less harmful were equally included for forfeiture under the doctrine referred to. The doctrine of *deodand* did not at all proceed upon the basis of the instrumentality being a dangerous one. Besides the statute here under review is not one that undertakes to provide for a forfeiture of the thing—the automobile—dangerous or not. Its plain meaning is that for damages (not measured by the value of the machine) consequent on negligence or willful violation of its provisions, an action lies.

In our view the question is capable of solution by a resort to rules that are fairly familiar, and certainly more obviously applicable.

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It should be noted at the outset that we are not concerned here with the serious question of the power of the legislature constitutionally to enact a statute providing for such a lien in favor of the person injured, which lien might be made to attach to an automobile, or other vehicle, in disregard of the interests of previous lienors. We say serious because of the fact that the vehicle in question was not harmful or noxious *per se*, so as to require its suppression or destruction to remove a danger imminent from its very existence. It might with no inconsiderable reason be urged that the only right under the police power was one to regulate by way of punishment the owner in possession and dominion and control for an unlawful use of that which was designed for a legitimate use.

What we have to deal with is the construction of the act in respect of a claim that such prior lienor's interests have been disregarded.

The lien in behalf of the one injured or of the estate of the one killed is of statutory creation. A right to it did not exist before the particular act was passed. By a long line of decisions where a statute creates a lien that lien as contradistinguished from a common-law lien, is held not to take precedence of a prior contractual lien where the creating statute does not clearly show or declare an intention to cause the statutory lien to override the earlier one. This is true even where the statutory lien is one that arises for work done on, and to the betterment of, the property in question. *Wilson v. Donaldson*, 121 Cal., 8, 56 Pac., 404,

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43 L. R. A., 524, 66 Am. St. Rep., 17; *Adler v. Godfrey*, 153 Wis., 186, 140 N. W., 1115; *Reeves & Co. v. Russell*, 28 N. D., 265, 148 N. W., 654, L. R. A., 1915D, 1149, and cases cited in annotation at page 1154; *Shaw v. Webb*, 131 Tenn., 173, 174 S. W., 273, L. R. A., 1915D, 1141, Ann. Cas., 1916A, 626, and cases cited.

A common-law lien does not, of course, lose its dignity in this particular respect by reason of the fact that it had been codified or redeclared in statutory form. It is none the less one of common-law origin.

The Court of Appeals of New York holds the same view, and further conceived that a legislative act which redeclares a common-law lien and undertakes to make it superior to a lien previously fixed may be constitutional; whereas, it would be unconstitutional if a lien of statutory creation was attempted to be given priority. In the first case there would, it holds, be no denial of due process of law and no opposition to "the law of the land." This for reason that such a common-law lien was itself a part of the law of the land before the first Constitution of that State was adopted, and has, it conceives, a higher *status* than a mere statutory lien. *Horace Waters Co. v. Gerárd*, 189 N. Y., 302, 82 N. E., 143, 24 L. R. A. (N. S.), 958, 121 Am. St. Rep., 886, 12 Ann. Cas., 397.

When a lien comes into existence by force of a statute, it must be measured by the statute, and can have no greater force than the statute gives it. If the legislature manifests no intention of giving it superiority over other liens, it can have none. *Wilson v. Donald-*

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son, supra, and cases cited; *Hanch v. Ripley*, 127 Ind., 151, 26 N. E., 70, 11 L. R. A., 61; Jones, Liens, section 691.

The act creating the lien should be specific in declaring the fact, as well as the nature and extent of the lien and not leave the superseding or subordinating of an earlier lien to inference. *McDaniel v. Osborn*, 166 Ind., 1, 75 N. E., 647, 2 L. R. A. (N. S.), 615, 618, 117 Am. St. Rep., 354; Jones, Chattel Mort. section 474. Particularly should this be true where, as in this case, the lien is not awarded for any service that adds value or that preserves the property on which the earlier lien rests, and where it may be held that there was a benefit accruing.

The true rule was tersely stated in *Des Moines Brick Co. v. Smith*, 108 Iowa, 307, 79 N. W., 77:

“The contention of plaintiff is that its later lien supercedes the other. The rule, in the absence of statutory provision to the contrary, is that liens take precedence in the order of time; the first in point of time being superior. The only exception to this that we now recall is a bottomry bond, and it is expressly recognized by text-writers as differing in this respect from all other common-law liens. 3 Kent, Comm. 437. This order of priority will not be disturbed or altered, unless expressly provided by statute.”

Our own act of 1897, chapter 78, which gives to employees of corporations and corpartnerships a lien upon the property of the corporation or firm in event of insolvency, is made thus specific in setting out that

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“such lien shall prevail over all other liens,” except those of a certain class of mortgages presently to be noted. Other instances of declarations of such priority in terms are to be found: Code Shannon, sections 3533, 3536 (mechanic’s lien over vendor’s lien, conditionally); 3569 (farm laborer’s lien); 3585 (railroad contractors over mortgage liens and all others).

Looking further into the legislative policy of this State, we find that it has been consistent on the point of protecting the lien for purchase money. Even the Constitution makes the favored right of homestead subordinate to the vendor’s lien; the mechanic’s lien for improvements made on property is secondary to the vendor’s lien except on the vendor’s acquiescence after notice. In the act of 1897, which has been referred to immediately above, the lien of the employees is by express exception made secondary to “the vendor’s lien or the lien of a mortgage or deed of trust to secure purchase money.” Had it been the intention of the legislature to subordinate or subject the rights of the conditional seller (as lienor) in such an automobile, it knew how to clothe the purpose in adequate words. In the light of local legislative history, we feel assured that it would not have left its intent to inference.

The “owner” mentioned in the fifth section of the act, quoted above, is the same “owner” who by the terms of an earlier section is required to register his car, giving his name and street address. A new owner, on a transfer of the car, it is provided, shall take

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out a certificate. The conditional seller is not then the owner within the meaning of that word so used.

It is a rule of statutory construction that where the same word is used in a statute more than once, and the meaning is clear at one place, it will ordinarily be construed to have that meaning elsewhere in the act. 2 Lewis' Suth. Stat. Constr. (2d Ed.), p. 758.

In *Daugherty v. Thomas*, 174 Mich., 371, 140 N. W., 615, 45 L. R. A. (N. S.), 699, Ann. Cas., 1915A, 1163, the court defined the word "owner" in an automobile statute. There the effort of a litigant was to restrict the meaning of the word, while here it is to enlarge it. The court said:

"We hardly need quote authorities to the effect that the owner of the property is the one who has dominion over it, and has a right to enjoy and do with it as he pleases, unless he is prevented by some contract or law which restrains his rights."

As said by Lord Atkinson in a recent case (*Samson v. Aitchison*, [1912] A. C., 844):

"The duty to control postulates the existence of the right to control. If there is no right to control there can be no duty to control."

A Canadian case called for the construction of an act in respect to who was the "owner" of an automobile responsible for the violation of a legislative act. The court said:

"The purpose of section 19 was to render the person having dominion over the vehicle, and in that sense the owner of it, answerable for any violation in the com-

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mission of which the vehicle was the instrument, by whomsoever it might be driven; and I do not think that it can have been intended to fix the very serious responsibility, which the section imposes upon one who, like the respondent, at the time the accident happened, had neither the possession of, nor the dominion over, the vehicle, although he may have been technically the owner of it in the sense in which the owner of the legal estate in the land is the owner of land." *Wynne v. Dalby*, 30 Ontario, 67.

It has been clearly pointed out by this court where a sale had been made with title retained in the vendor that "the possession, use and profits of the property had passed from the vendor to the purchaser; the vendor was not authorized to exercise any act of ownership or control." over the property (*Bank v. Vandyck*, 4 Heisk. [51 Tenn.], 617); and that the property had passed under the dominion and control of the vendee, and so far forth that he would be liable on the purchase-money note notwithstanding loss or destruction of the property. *Marion Mfg. Co. v. Buchanan*, 118 Tenn., 238, 99 S. W., 984, 8 L. R. A. (N. S.), 590, 12 Ann. Cas., 707.

The governing principle was applied in a case decided by the supreme court of Nebraska (*Goff v. Byers*, 70 Neb., 1, 96 N. W., 1037), which involved a lien declared by statute in favor of the owner of cultivated land on trespassing animals for damages done by such animals, and a claim of priority for it over the antedating lien of a mortgage. The legislative act pro-

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vided that the person whose property was damaged should have a lien upon the trespassing animals for the full amount of damages and costs, and contained no express provision giving it preference over other liens.

“The statutory lien is given to the person injured to enable him to obtain satisfaction from the person through whose fault or omission of duty the injury was occasioned. A mortgagee without possession could not, of course, be sued in a case of this kind, and it would be an anomaly in the law, if his property could be taken for the satisfaction of a claim upon which he was not personally liable. Under the statute of Alabama giving a lien for damages upon trespassing stock, it was held that the statutory lien was subordinate to the lien of a prior mortgage executed by the owner. The court in *Lehman v. Ferrell*, 71 Ala., 458, said: ‘We think the lien the statute gives on the stock doing damage can only be commensurate with the ownership of the person by whose voluntary permission the stock runs at large. Ballard was the person sued. . . . The lien can only extend to such title and interest as he was the owner of.’ ”

We therefore are of opinion that only the interest of the vendee, as the owner of the automobile, was liable to be attached and subjected. The meaning of section 5 of the statute is that there shall be a lien upon such automobile if driven at the time of the injury by such owner, or any one driving it under him—that is, under him as the one exercising dominion over it—whether it be his chauffeur or servant, or one in charge

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under a contract of bailment or hire. The last clause, "or any other person using the same by loan, hire or otherwise," was meant to cover broadly an arrangement by which the owner, such as the keeper of a garage, who, exercising his power of control, permits the driver of the machine to run it. The spirit of the provision is to subject that which is owned by him who has it in his own power to select the agency by which the machine is propelled or to be propelled. As we have seen this is the conditional vendee. The statute does not operate a forfeiture or subjection of the interest of one who has it not in his power to protect his interest by any exercise of discretion as to the movements of the machine, or as to who shall move it.

The court of civil appeals refers throughout its opinion to cases in admiralty where vessels in collision are proceeded against *in rem* and subjected regardless of the rights of prior mortgagees or lienors. In such cases, however, the procedure is not according to the common law, but to that part of the civil law system that has been moulded into what is termed the maritime law. However, in such cases, also, the rule appears to be, in accord with what has been noted, that:

"A forfeiture for violation of a statute does not affect liens acquired prior to the illegal act." 26 Cyc., 798, and cases cited.

We think it clear that the statute under review does not undertake to provide for a proceeding *in rem*—against the automobile as the *res*. As was said in respect of another of our lien statutes provided to be enforced by attachment:

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“The Code however, in its provisions, seems evidently, as we think, to contemplate not only that the owner or owners should be parties, but that they should be defendants to the suit in the precise sense in which parties are defendants in other like cases of enforcement of debts. . . . It is not a proceeding *in rem*, in which the vessel is defendant.” *Waggoner v. St. John*, 10 Heisk. (57 Tenn.), 503.

And see *Montgomery v. Rich*, 3 Tenn. Ch., 660; *Pierce v. Lawrence*, 16 Lea (84 Tenn.), 572, 1 S. W., 204.

Believing that the statute and the rights of the petitioner have been misconceived, the judgment of the court of civil appeals is reversed, and the cause is remanded to the circuit court for further proceedings. Costs of the appeal will be paid by respondent.

SWIGGART, Special Judge, dissents.

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JOHN HODGE v. THE STATE. *

(Jackson. April Term, 1916.)

1. COURTS. Establishment. Powers of legislature. "Inferior courts."

Priv. Laws 1915, ch. 78, establishing a criminal court in Dyer county and prescribing its jurisdiction, is within the power conferred on the Legislature by Const. art. 6, sec. 1, declaring the the judicial power shall be vested in the supreme court, and in such circuit, chancery, and other inferior courts as the legislature shall ordain and establish, since the new court is an "inferior court." (*Post*, pp. 528-534.)

Acts cited and construed: Acts 1915, ch. 78; Acts 1829-30, ch. 95.

Cases cited and approved: *Granville Wilcox v. State*, 50 Tenn., 110; *Gray v. State*, 50 Tenn., 113; *Moore v. State*, 37 Tenn., 512; *McClain v. State*, 1 Shan. Cas., 480; *Re-districting Cases*, 111 Tenn., 254; *Railroad v. Byrne*, 119 Tenn., 278; *State v. Lindsay*, 103 Tenn., 625; *Coleman v. Campbell*, 3 Shan. Cas., 355; *Halsey v. Gaines*, 70 Tenn., 316; *Shelby Co. v. Judges*, 3 Shan. Cas., 525; *Hurt v. Hurt*, 70 Tenn., 177; *Miller v. Conlee*, 57 Tenn., 432; *Ward v. Thomas*, 42 Tenn., 565; *State v. Wilson*, 70 Tenn., 211; *Kelly v. Conner*, 122 Tenn., 339.

Cases cited and distinguished: *Ellis v. State*, 92 Tenn., 85; *Bank v. Cooper*, 10 Tenn., 599; *Judges' Cases*, 102 Tenn., 510; *Jackson v. Nimmo*, 71 Tenn., 598.

Constitution cited and construed: Sec. 1, arts. 5, 6; Sec. 2, art. 6, (1854-1870).

2. JUDGES. Appointment. Powers of legislature.

Although Const. art. 11, sec. 17, provides that no county office of legislative creation shall be filled otherwise than by the people or the county court, the legislature may under article 7, sec. 4, providing that the election of all officers and filling

*Authorities on the question of the power of legislature to interfere with superintending control over inferior tribunals, are gathered in notes in 51 L. R. A., 111; 20 L. R. A. (N. S.), 946.

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of all vacancies not otherwise provided for by Constitution shall be made as the legislature may direct, provide as by Priv. Laws 1915, ch. 78, sec. 12, that the office of judge of the criminal court of Dyer county be filled by appointment until the next general election. (*Post*, pp. 534, 535.)

Acts cited and construed: Acts 1915, ch. 78, sec. 12.

Cases cited and approved: *State ex rel. v. Trehwitt*, 113 Tenn., 561; *Condon v. Maloney*, 108 Tenn., 82; *State ex rel. v. Maloney*, 92 Tenn., 62; *Richardson v. Young*, 122 Tenn., 471; *Re-districting Cases*, 111 Tenn., 234; *Luehrman v. Taxing Dist.*, 70 Tenn., 440.

Constitution cited and construed: Art. 11, sec. 17; Art. 7, sec. 4.

3. **CLERKS OF COURTS.** Appointment. Powers of legislature. Priv. Laws 1915, ch. 78, sec. 4, providing that the clerk of the circuit court of Dyer county shall be clerk of the criminal court of such county, does not violate Const. art 6, sec. 13, requiring that clerks of inferior courts be elected by the voters every four years. (*Post*, pp. 535, 536.)

Acts cited and construed: Acts 1915, ch. 78, sec. 4.

Constitution cited and construed: Art. 6, sec. 13.

4. **CLERKS OF COURTS.** Judges. Establishment of offices. Statutes. Validity.

Priv. Laws 1915, ch. 78, being intended to relieve the circuit court of Dyer county of certain duties, properly provides by sections 4, 12, that the judge of the county court and clerk of the circuit court shall perform the duties of the criminal court established by the act, and it is unnecessary that a new judgeship and clerkship be established. (*Post*, pp. 536, 537.)

Acts cited and construed: Acts 1915, ch. 78.

Constitution cited and construed: Art. 6, sec. 1 (1870).

5. **STATUTES.** Construction. Acts in *pari materia*.

Priv. Laws 1915, ch. 78, as to criminal court of Dyer county, must be construed *in pari materia* with chapter 82, passed on the same day, creating the office of county judge in such county. (*Post*, p. 537.)

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6. CLERKS OF COURTS. Judges. Holding two offices. "Lucrative office."

Priv. Laws 1915, ch. 78, secs. 4, 12, providing that the judge of the county court of Dyer county shall act as judge of the criminal court created by the act, and the clerk of the circuit court as clerk of such criminal court, does not violate Const. art. 2, sec. 26, providing that no person shall hold more than one "lucrative office," since the act expressly provides that there shall be no compensation therefor. (*Post*, pp. 537-539.)

Acts cited and construed: Acts 1915, ch. 78, secs. 4, 12.

Cases cited and approved: *State v. Kirk*, 44 Ind., 401; *Chambers v. State*, 127 Ind., 365; *State ex rel. v. Slagle*, 115 Tenn., 336.

Constitution cited and construed: Art. 2, sec. 26.

7. JUDGES. Appointment. Powers of legislature.

Under Priv. Laws 1915, ch. 78, sec. 12, providing that the county judge of Dyer county shall act as judge of the criminal court in that county, no express appointment of such judge to the new office is necessary; the act itself being sufficient authority. (*Post*, p. 539.)

Constitution cited and construed: Art. 6, sec. 1.

8. JUDGES. Statutes. Certainty. Intent of legislature.

Priv. Laws 1915, ch. 78, sec. 12, providing that the "judge of the court" of Dyer county shall be judge of the criminal court, and receive no other compensation than provided by law for said county judge, clearly shows that the county court was intended, and is not objectionable for omission of "county" before the words "court of Dyer county." (*Post*, pp. 539, 540.)

Acts cited and construed: Acts 1915, ch. 78, sec. 12.

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Acts cited and construed: Acts 1915, ch. 78, secs. 4, 12.

Cases cited and approved: *State v. Kirk*, 44 Ind., 401; *Chambers v. State*, 127 Ind., 365; *State ex rel. v. Slagle*, 115 Tenn., 336.

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COOVER & WARD, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney General,
for the State.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

One question presented by this appeal is the constitutionality of chapter 78, Acts of 1915 (see page 239 of Private Acts of that year). Plaintiff in error was convicted of the offense of assault and battery after a trial in the court which the act purports to establish. No bill of exceptions appears in the transcript, and no question is made on the sufficiency of the evidence to sustain the judgment.

Upon the question first above suggested, it is insisted that the general assembly went beyond the power vested in it by the Constitution when it enacted sections 1 and 2 of the act. Section 1 established a criminal court at Dyersburg in the county of Dyer and conferred on the court jurisdiction coextensive with the limits of said county, and section 2 prescribed the character of cases falling within the jurisdiction of the court.

The first section of the sixth article of the Constitution of this State declares, that:

“The judicial power of this State shall be vested in one supreme court, and in such circuit, chancery, and other inferior courts as the legislature shall, from time to time, ordain and establish, in the judges thereof, and in justices of the peace. The legislature may also vest

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such jurisdiction in corporation courts as may be deemed necessary; courts to be holden by justices of the peace may also be established."

The court which section 1 of the act purports to create is an inferior court within the meaning of the above excerpt from the Constitution. It is inferior to the supreme court, in the same sense that circuit and chancery courts are inferior. The Constitution in section 1, article 6, provides for "one supreme court" and to distinguish that court from the courts next immediately mentioned, they are classed as inferior courts. The criminal court of Dyer county clearly falls within the classification "other inferior courts," and these courts, when ordained and established by legislative act, are the direct fruits of power conferred by said section of the Constitution on the legislative department of the State. In so holding we announce no new doctrine. See *Granville Wilcox v. State*, 50 Tenn. (3 Heisk.), 110; also marginal reference to the case of *Gray v. State*, 50 Tenn., 113; *Moore v. State*, 37 Tenn. (5 Sneed), 512; *McClain v. State*, 1 Shan. Cas., 480; *Ellis v. State*, 92 Tenn. (8 Pick.), 85, 20 S. W., 500.

For cases shedding light on the question, see *Redistricting Cases*, 111 Tenn. (3 Cates), 234, 80 S. W., 750; *Judges' Cases*, 102 Tenn. (18 Pick.), 510, 53 S. W., 134; *Railroad v. Byrne*, 119 Tenn. (11 Cates), 278, 104 S. W., 460; *State v. Lindsay*, 103 Tenn. (19 Pick.), 625, 53 S. W., 950; *Coleman v. Campbell*, 3 Shan. Cas., 355; *Halsey v. Gaines*, 70 Tenn. (2 Lea), 316; *Shelby County v. Judges*, 3 Shan. Cas., 525; *Hurt v. Hurt*, 70 Tenn. (2

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Lea), 177; *Miller v. Conlee*, 37 Tenn. (5 Sneed), 432; *Ward v. Thomas*, 42 Tenn. (2 Cold.), 565; *State v. Wilson*, 70 Tenn. (2 Lea), 211.

In *Ellis v. State*, supra, it was said:

“The power of the legislature to establish special courts, under section 1, article 6, of the Constitution, is well established, and is not denied in this case” (citing some of the authorities).

The brief for appellant relies on *Bank of the State v. Charles Cooper et. al.*, 10 Tenn. (2 Yerg.), 599, 24 Am. Dec., 517 (appendix). In that case, the constitutionality of chapter 95 of the Acts of 1829-30, was involved. Chapter 95 purported to create a special court to be holden at Nashville, and to consist of Jacob Peck, one of the judges of the supreme court, Nathan Green, one of the chancellors of this State, and William E. Kennedy, one of the judges of the circuit court, and to confer certain special jurisdiction upon such court. The bank, by its bill, invoked the judgment of said special court against Cooper upon the claim that he was indebted to it in a certain sum, and Cooper pleaded to the jurisdiction of the court. Each of the three judges named rendered an opinion holding the act to be in violation of the Constitution of the State then in force; that is to say, the Constitution of 1796.

Section 1, art, 5, of that instrument provided that:

“The judicial power of the State shall be vested in such supreme and inferior courts of law and equity as the legislature shall, from time to time, direct and establish.”

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The opinion of Judge Green held that:

“It would be perfectly competent for the legislature to abolish the supreme court, and take away the right of appeal from the county to the circuit court. Each would then exercise its own peculiar jurisdiction, and be supreme within its sphere of action.”

The excerpt from the opinion followed a holding therein that there then existed no constitutional guaranty of the right of appeal, that right existing only under the statute.

We need not consider the particular grounds on which each of the three judges held the act unconstitutional. Suffice it to say, when properly understood, the case is no support for the insistence of appellant which is now under consideration. The opinion of Judge Green shows that he thought the legislative department, under the Constitution then existing, was clothed with a much broader power in respect of the abolishment and creation of courts than that power which was exercised in the passage of the act of which appellant complains.

It is to be remembered that *Bank of the State v. Cooper* was decided in 1831. In 1834 a new Constitution was adopted, and by section 1, article 6 thereof, it was declared:

“The judicial power of this State shall be vested in one supreme court, in such inferior courts as the legislature shall, from time to time ordain and establish, and the judges thereof, and in justices of the peace the legislature may also vest such jurisdiction as may

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be deemed necessary in corporation courts.”

This provision was, in turn, supplanted by section 1, article 6, of the Constitution of 1870, set out earlier in this opinion.

By the changes noted in the fundamental law, it is undoubtedly true that some of the breadth of legislative power so clearly expressed by Judge Green in *Bank of the State v. Cooper*, supra, was shorn away, as may be seen by examination of the opinion of the court delivered by its present Chief Justice in the *Redistricting Case* in 111 Tenn. (3 Cates), 234, 80 S. W., 750. See, also, the majority opinions in the *Judges' Cases*, 102 Tenn. (18 Pick.), 510, 53 S. W., 134.

In the case last mentioned the opinion of Judge Wilkes, commenting on the Constitution of 1870 (article 6, section 1), says:

“It is evident from the provisions of the Constitution that but few limitations were intended to be placed upon the power of the legislature to create, establish, and change inferior courts. Limiting safeguards were placed around the supreme court, to protect it both from legislative and executive control, which were not placed around the inferior courts. It was provided there should be but one supreme court so that its powers and prerogatives could not be lessened by being divided; the number of judges was fixed, so that it could neither be increased nor diminished; the places of holding its courts were fixed, so that they could not be changed. None of these limitations were thrown around the inferior courts. The number of courts, the

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number of judges, and the places of holding these courts were left to be determined by the legislature," etc.

In *Bank of the State v. Cooper*, Judge Green said:

"Nor can it be seen that it was intended to restrict legislation to the creation of such courts as should be appealed from, and therefore, 'inferior,' and an appellate court, which would be therefore, 'superior.' "

This statement was true as applied to the Constitution of 1796 of which Judge Green was speaking, but such a statement cannot be truly made of the Constitution of 1834 or that of 1870, by each of which it is provided, in section 2, art. 6, speaking of the supreme court, that:

"The jurisdiction of this court shall be appellate only, under such restrictions and regulations as may, from time to time, be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present supreme court."

Thus was there stamped on the supreme court the distinctive character of an appellate and consequently a superior tribunal and in which, by the first section of article 6 of the Constitution of 1834 and 1870, such part of the judicial power of the State was vested as was needful for the exercise of the jurisdiction conferred. Manifestly, when one court is by the Constitution of 1870 designated as "Supreme" and vested with power and jurisdiction as aforesaid, the words, "such circuit, chancery and other inferior courts as the legislature shall, from time to time, ordain and establish,"

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amount to a classification of each and all of the courts last named as "inferior," and by force of the words used, these inferior courts are clearly within the power conferred on the legislature to "ordain and establish."

Section 8, art. 6, of the Constitution of 1870 is:

"The jurisdiction of the circuit, chancery, and other inferior courts, shall be as now established by law, until changed by the legislature."

This section has been held to be—

"a reservation of power to alter the jurisdiction of the courts established, and as a matter of course to enlarge or diminish, or else there could be no alteration." *Jackson v. Nimmo*, 71 Tenn. (3 Lea), 598.

See, also, *Kelly v. Conner*, 122 Tenn. (14 Cates), 339, 123 S. W., 622, 25 L. R. A. (N. S.), 201.

We think the first point made by the appellant is without merit.

The next question raised is that the legislature was without power to pass section 12 of the act, which is, in substance, that the judge of the county court of Dyer county shall be the judge of and hold the criminal court of Dyer county, and shall receive no other compensation than is provided by law for such county judge. Appellant insists that section 12 of the act contravenes article 11, section 17, of the Constitution, providing that no county office created by the legislature shall be filled otherwise than by the people or the county court, but article 7, section 4, of the Constitution provides:

"The election of all officers and the filling of all vacancies not otherwise directed or provided by this Con-

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stitution shall be made in such manner as the legislature shall direct."

And it is well settled that:

"The legislature upon creating a new county office or State office may provide for the filling of such office by appointment until the next general election."

State ex rel. v. Trehwitt, 113 Tenn. (5 Cates), 561, 82 S. W., 480; *Condon v. Maloney*, 108 Tenn. (24 Pick.), 82, 65 S. W., 871; *State ex rel. v. Maloney*, 92 Tenn. (8 Pick.), 62, 20 S. W., 419.

In another case it was said:

"We are also of the opinion that article 7, section 4, of the Constitution expressly authorizes the legislature to exercise the appointing power by legislative act, or in joint session of the members of the two houses. There is no limitation of the agencies it may employ; and it has been held that, where the Constitution authorizes the legislature to direct a thing to be done, upon the principle that the greater power includes the less, it may do the thing to be directed." *Richardson v. Young*, 122 Tenn. (14 Cates), 471, 516, 125 S. W., 664, 674, citing *Redistricting Cases*, 111 Tenn. (3 Cates), 234, 80 S. W., 750; *Luehrman v. Taxing Dist.*, 70 Tenn. (2 Lea), 440.

Appellant next insists that section 4 of the act, which provides that the clerk of the circuit court of Dyer county shall be the clerk of "said criminal court, and shall perform the duties required by law of clerks in relation to said criminal business in the circuit courts of the State receiving the same compensation as pro-

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vided by law for circuit court clerks," is an attempt by the general assembly to exercise power which it did not possess. It is said that this part of the act violates section 13, art. 6, of the Constitution. We cannot agree to this conclusion. The only part of section 13, art. 6, which applies to the point made is that which provides that:

"Clerks of inferior courts, holden in the respective counties or districts, shall be elected by the qualified voters thereof for the term of four years."

Now, if the legislature were clothed with power to enact section 12, and we have held that it had such power, we can see no reason to deny its power to enact section 4 of the act.

Up to this point we have discussed the case upon the hypothesis that appellant's view of the scheme of the act was correct, and we have answered his assaults on that theory, but we think he misconceives the scheme of the legislation. We think the legislature intended to and did create by this act a court to relieve the circuit court of Dyer county of the burden of disposing of such cases as are mentioned in section 2 of the act. To accomplish this result, it was necessary to provide for a judge to preside over the court, and to provide for an officer to perform the clerical duties for the new court, but it did not follow that a new judgeship or a new clerkship should be created, especially and exclusively charged with the duties aforesaid. It was within the power of the legislature merely to create the court, confer jurisdiction upon it, and to delegate

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to the judge of the county court the additional, and incidental or *ex officio* duty of presiding as judge over the criminal court of Dyer county, and this power was exercised by section 12 of the act. The legislature had the power to provide for the performance of the clerical work necessary for the new court, and this power it exercised in section 4 of the act. These powers fall clearly within the power to "ordain and establish" inferior courts conferred on the legislature by section 1, art. 6, of the Constitution of 1870.

We have already noticed that no new judgeship was created by the act assailed, but, on the same day the act was passed the legislature passed chapter 82 of the Acts of 1915 (see page 248 of the Private Acts of that year). By this act (see its section 1) a new judgeship was created in these words:

"That there shall be elected by the qualified voters of Dyer county, Tennessee, a person learned in the law and a licensed attorney in the State of Tennessee to be styled the county judge," etc.

His term of office and duties were fixed by the act. This chapter 82 must be considered and construed *in pari materia* with chapter 78.

As is shown by the fourth section of chapter 78, and already herein noted, the clerical work for the new court was laid upon an officer already elected, qualified, and acting as clerk of the circuit court of Dyer county. The duties imposed on the clerk for the new court were merely incidental or *ex officio* in character. They were the same which as clerk of the circuit court

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would have been imposed on him had chapter 78 never been passed.

By section 16 of the act it is provided:

“That all the duties that would develop upon the judge of the criminal court under this act will be performed by the chairman of the county court of Dyer county, until said criminal court judge shall have been appointed or elected, and that the chairman shall receive no additional compensation for said services than is now allowed him by the quarterly court of Dyer county.”

Appellant insists that this section and section 12 of the act are violative of that part of section 26, art. 2, of the Constitution which provides:

“Nor shall any person in this State hold more than one lucrative office at the same time.”

“A lucrative office is one whose pay is affixed to the performance of its duties (*State v. Kirk*, 44 Ind., 401, 15 Am. Rep., 239); and when the duties of the office are affixed by the statute, it is immaterial that the compensation of the officer is fixed by some other board or officer (*Chambers v. State*, 127 Ind., 365, 26 N. E., 893, 11 L. R. A., 613).”

The foregoing is a definition of such an office given in one of our cases. *State ex rel. v. Slagle*, 115 Tenn. (7 Cates), 336, 89 S. W., 326.

We are of the opinion that no new judicial office was created either by section 12 or by section 16 of chapter 78, and, furthermore, neither of said sections allows, but on the contrary each expressly disallows, any

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compensation for the services by each of these sections required, and therefore, if sections 12 and 16 each created new offices, neither of them is a lucrative office within the meaning of section 26, art. 2, of the Constitution.

The next assignment relied on by appellant admits that the judge who presided when this case was tried in the criminal court of Dwyer county was the judge of the county court of Dyer county, but insists that he was never appointed or elected judge of the criminal court of Dyer county, and therefore had no authority to preside over said court.

We have seen that section 12 of the act authorized the judge of the county court to hold the criminal court of Dyer county. This was sufficient authority under article 6, section 1, of the Constitution, which confers on the legislature the power to ordain and establish the criminal court of Dyer county. The legislature had power to make provision for a judge to preside over that court only, or to make that provision for a presiding judge which was made. No doubt, the legislature was moved by economic reasons. It is not our province, at least, to interfere with the exercise of a discretion which the Constitution has conferred upon the legislative department.

Another insistence made by appellant is based on an omission of the word "county" in the second line of the twelfth section of chapter 78, but the last words of section 12, "county judge," we think, clearly show

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the omission; the intent of the lawmaking body is clearly apparent when the whole section is read.

The remaining assignments of error each and all proceed on the idea that a new office of judge and a new office of clerk of the criminal court of Dyer county were created by the act; but we think this is a fallacy, as we have already explained, and therefore we overrule these remaining assignments and affirm the judgement.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1915.

L. H. NORTHCUT *et al.* v. LEWIS CHURCH *et al.* *

(*Nashville*. December Term, 1915.)

1. MINES AND MINERALS. Title. Adverse possession. By possession of surface.

Possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface, is not a possession of the underlying severed mineral interest, nor does such possession inure to the owner of the mineral; distinct estates being created by the severance. (*Post*, pp. 546-553.)

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Acts cited and construed: Acts 1819, ch. 28, sec. 1.

Cases cited and approved: *Murray v. Allred*, 100 Tenn., 100; *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 150 Pa., 235; *Louisville & N. R. Co. v. Massey*, 136 Ala., 156;

*The question of possession of surface as possession of minerals within rule against conveyance of land held adversely, is discussed in a note in 35 L. R. A. (N. S.), 745. As to effect of parol transfer of possession as basis of tacking, see note in 35 L. R. A. (N. S.), 498.

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Gordon v. Park, 202 Mo., 236; Catlin Coal Co. v. Lloyd, 180 Ill., 398; Kiser v. McLean, 67 W. Va., 294; Wallace v. Elm Grove Coal Co., 58 W. Va., 449; J. R. Crowe Coal & Min. Co. v. Atkinson, 85 Kan., 357; McBurney v. Coal & Coke Co., 121 Tenn., 275.

Code cited and construed: Sec. 4456 (S.).

2. MINES AND MINERALS. Title. Adverse possession. By possession of surface.

Acts of possession required for the surface and those for the minerals are different; the latter requiring some form of mining or activities directly related thereto. (*Post*, pp. 553-555.)

Cases cited and approved: Catlin Coal Co. v. Lloyd, 176 Ill., 275; Ames v. Ames, 160 Ill., 599; New Jersey Zinc Co. v. N. J. Franklinite Co., 13 N. J. Eq., 322; Gill v. Fletcher, 74 Ohio St., 295; Lillibridge v. Lackawana, etc., Co., 143 Pa., 293; Louisville, etc., R. Co. v. Massey, 136 Ala., 156; Manning v. Kansas, etc., Coal Co., 181 Mo., 359; Caldwell v. Copeland, 37 Pa., 427; Armstrong v. Caldwell, 53 Pa., 284; Huss v. Jacobs, 210 Pa., 145; Virginia Coal, etc., Co. v. Kelly, 93 Va., 332.

3. ADVERSE POSSESSION. Tacking. Privity.

Where the grantee of an adverse possessor takes possession, he may unite his subsequent possession with his grantor's prior possession to make out adverse possession for the seven-year period. (*Post*, pp. 555, 556.)

Case cited and approved: Finnegan v. Stineman, 5 Pa. Super. Ct., 124.

4. MINES AND MINERALS. Title. Adverse possession. Tacking.

Where the grantee of mineral rights of an adverse possessor takes immediate and appropriate possession thereof, he may unite his subsequent possession with his grantor's prior possession to make out statutory title by adverse possession. (*Post*, pp. 555, 556.)

5. COMMON LAW. Courts. Rules of decision. Decisions of other courts.

The courts of a State may refuse to follow even a consensus of authority in all other States, or a well-recognized rule of com-

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mon law, on the ground that it is not suited to the genius of the State or is opposed to its public policy; the public policy of a State being shown by its statutes and decisions. (*Post*, pp. 556-558.)

Cases cited and approved: *Welcker v. Staples*, 88 Tenn., 49; *Ramsey v. Quillen*, 73 Tenn., 184.

6. MINES AND MINERALS. Conveyance of legal rights. Right of access incident.

The grantor of minerals by implication of law conveys the right to obtain access to them through the surface, and against such purpose does not hold the surface adversely. (*Post*, pp. 558, 559.)

Acts cited and construed: Acts 1819, ch. 28, sec. 1.

FROM GRUNDY.

Appeal from the Chancery Court of Grundy County
—V. C. ALLEN, Chancellor.

ROBINSON & FANCHER, for appellants.

FULTS & SCHNOON and L. V. WOODLEE, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Complainants L. H. Northcut, and the heirs of H L. Raulston, deceased, claim the mineral interest in 177 acres of a tract of 200 acres, and the whole interest in twenty-three acres, the residue of the 200 acres. The defendants claim under one Francis Church to whom a grant of 5,000 acres of land was made in 1831. This grant included within its boundaries, but excluded from its operation, "100 acres belonging to one A. Higginbotham entered June 25, 1831, by No. 3083." The

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complainants claim under one W. R. Nunnely, through a deed made by him to one J. M. Nunnely, and by the latter to complainant Northcut, and H. L. Raulston, the ancestor of the other complainants. W. R. Nunnely's deed describes the land conveyed therein, as made up partly of the above-mentioned Higginbotham tract, but the bill charges that the whole 200 acres lies within the Church grant. Assuming that the complainants are bound by the deed which they have filed, then it is impossible to say how much of the 200 acres lies within the Church grant, and how much within the Higginbotham entry. However, the complainants do not de-rain their title either to the Church or the Higginbotham grant, if the latter ever procured a grant, on his entry, which is not shown. They trace title only to W. R. Nunnely, and it is not shown that he had any kind of title. An effort was made to prove that the land was sold for taxes due from Church, and that W. R. Nunnely had bought the land at tax sale, and received a tax deed, but this failed utterly. So, the complainants had no other recourse than to rely on the statute of limitations of seven years.

The facts applicable to this feature of the case are as follows:

The deed which W. R. Nunnely made to J. M. Nunnely, purporting to convey the 200 acres, was executed on the 24th day of July, 1884. The evidence shows that there were several settlements on the land, running back more than seven years prior to that deed, but no color of title is shown covering them, nor are the

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bounds or descriptions of such settlements shown. All of these must therefore go for naught. It is also shown that J. M. Nunnely divided the land among his children, and put them in possession of parts of it, but the deeds are not exhibited, nor are the descriptions of the holdings of the children given. In view of this fact the defendants insist that since the burden of proof to make out a claim under the statute of limitations rests upon one who relies thereon, and that the evidence must be substantial and clear (*Coal & Iron Company v. Coppinger*, 95 Tenn., 526, 530, 32 S. W., 465), the complainants' case breaks down under the uncertainty thus created as to how long J. M. Nunnely, under whom they claim, in fact held possession of the land.

But passing this, we shall assume that inasmuch as no deeds appear as made by J. M. Nunnely to his children, their various holdings were under and for him, after he received his color of title on the 24th of July, 1884.

He did not hold this land, however, under his color of title for as much as seven years before he made his conveyance to the complainant Northcut, and H. L. Raulston. This latter deed was made on the 7th of June, 1890, showing an interval of less than six years.

Perhaps we might stop at this point and refuse further to consider complainants' claim under the statute of limitations, on the ground that it does not appear that all of the land sued for, or how much of it, was land that had been granted by this State or the State of North Carolina; the Act of 1819, chapter 28,

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section 1, requiring such fact to be shown as a necessary groundwork on which to erect a title acquired under the statute of limitations (Sh. Code, section 4456), but we shall waive this question, and proceed to determine the controversy on the point chiefly argued by counsel, at the bar of the court, and in the briefs and written arguments filed.

That question arises on the fact that J. M. Nunnely, had held the land under color of title less than seven years when he conveyed the mineral interest in the 177 acres to Northcut and Raulston, and the further fact that neither vendor nor vendees exercised any acts of ownership appropriate to indicate possession of such mineral interest. The contention of the complainants is that J. M. Nunnely continued to hold possession of the surface for a period longer than seven years from the date of his deed from W. R. Nunnely, and that this possession inured to the benefit of the persons to whom he had conveyed the mineral interest, and that thus seven years' adverse possession was made out for them. Adding his possession of the surface before his conveyance to Northcut and Raulston and his possession after that time, Nunnely had, prior to the bringing of this action, held the surface of the land more than seven years; but there is no evidence that any mining was attempted, or any effort made to take possession of the minerals as such. So, we have the question: Is the possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface a possession of

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the underlying severed mineral interest, and does such possession inure to the owner of the mineral?

The negative of this question is so well settled in other jurisdictions that we should have no hesitancy in answering in the same manner but for the fact that there is a conflict on the subject in our own decisions.

The first case is *Murray v. Allred*, 100 Tenn., 100, 43 S. W., 355, 39 L. R. A., 249, 66 Am. St. Rep., 740. The facts of that case were viz.: On the 24th of October, 1853, one Rodgers conveyed to Matthias Wright a tract of land lying in Fentress county, reserving all minerals. Wright subsequently conveyed the same land to another without making any reservation, and through a series of conveyances the land passed to Allred, each of the deeds by Wright and those claiming under him, purporting to pass an estate in fee. Facts were agreed upon in the case to the effect that Allred, and those through whom he claimed, had been in the actual, open, and continuous adverse possession of the land, under color of title, for more than seven years before action brought, but that neither he nor any one under whom he claimed had done any mining on the land, or attempted anything of the kind.

Murray claimed the mineral interest under Rodgers, who, as stated, had reserved this interest when he conveyed to Wright. Allred having refused to permit Murray to enter on the land to explore for minerals, the question was brought before one of the chancellors of the State by an agreed case to settle the rights of the parties. He decided against Murray, and on appeal

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Murray's third assignment of error was that the mineral interest by the reservation referred to, having been severed from the surface, possession of the latter was not inconsistent with the rights of the owner of such mineral interest, not adverse, and therefore that the statute of limitations had not run against him, and the chancellor erred in not so decreeing.

The court sustained this assignment, basing its decision on the following principles: That the owner of real estate may sell the land to one man, the coal, iron, gas, or oil to another, or others, giving to each purchaser a deed in fee simple for his particular deposit or stratum, while he retains the surface for agricultural purposes precisely as he held it before; the severance being complete for all legal and practical purposes, each separate layer or stratum becoming a subject of taxation, incumbrance, levy, or sale, precisely like the surface; and the possession of the soil by its owner for the purpose of tillage, giving him no possession of the underlying minerals; that in order to make a holding adverse to one who has reserved, or had granted to him, minerals in place, there must appear to have been some denial of his right, or assertion of a claim inconsistent therewith, and that the use of the surface for agricultural purposes is not the assertion of a right inconsistent with the right of the owner of minerals to mine under the surface for the purpose of extracting them. 100 Tenn., 100, 102, 119, 120, 43 S. W., 355, 39 L. R. A., 249, 66 Am. St. Rep., 740.

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These principles are supported by a practically solid array of authorities in all the other States where similar questions have arisen, and also by the text-books. *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa., 235, 18 Atl., 724, 5 L. R. A., 731; *Louisville & N. R. Co. v. Massey*, 136 Ala., 156, 33 South., 896, 96 Am. St. Rep., 17; *Gordon v. Park*, 202 Mo., 236, 100 S. W., 621, 119 Am. St. Rep., 802; *Catlin Coal Co. v. Lloyd*, 180 Ill., 398, 54 N. E., 214, 72 Am. St., Rep., 216; *Kiser v. McLean*, 67 W. Va., 294, 67 S. E., 725, 140 Am. St. Rep., 948, and note, pp. 951-969; *Wallace v. Elm Grove Coal Co.*, 58 W. Va., 449, 52 S. E., 485, 6 Ann. Cas., 140, and note; *J. R. Crowe Coal & Mining Co. v. Atkinson*, 85 Kan., 357, 116 Pac., 499, Ann. Cas., 1915D, 1196, and note; White on Mines and Mining, 32; Barringer & Adams on the Law of Mines and Mining, pp. 36, 59 and 60; 1 Cyc., 994, 995; 2 Corpus Juris, 147, sec. 258; 1 Ruling Case Law, pp. 738, 739, sec. 57.

In the subsequent case of *McBurney v. Coal & Coke Co.*, 121 Tenn., 275, 118 S. W., 694, the existence of these principles is fully recognized, but it is said in the opinion that the better rule is that possession of the surface by one who has conveyed to others the underlying minerals in place is a possession in the interest of the latter, as well as for himself; that is, it is also a possession of the minerals. The facts of that case were: Julian F. Scott, claiming ownership of the land, conveyed it, in 1851, to one Duncan, reserving

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the underlying coal. Duncan thereafter, between 1851 and 1856, conveyed this land to Edward R. Diden, in several parcels or tracts, by four separate deeds. The question relating to the controversy now before us arose in respect of a certain tract of 342 acres, part of one of the original tracts. Claiming this tract under his father's will, John S. Diden, the son of Edward R. Diden, took possession of it in 1879, and resided upon it continuously, openly, and adversely for twenty-eight years, or until the bringing of the action by McBurney. In 1884, when he had held this land in possession for a period not longer than five years, he conveyed the mineral interest to J. H. Parker & Co. In 1890 Parker & Co. conveyed the mineral interest to Chandler, and the latter, on the same day, conveyed it to the Glenmary Coal & Coke Company. Although, as previously stated, when Julian F. Scott conveyed the land to Duncan he reserved the mineral interest in all the land, the latter, when he conveyed to Edward R. Diden, did not reserve the mineral in the tract of which the 342 acres was a part; but, as just stated, John S. Diden, son of Edward R. Diden, who was the vendee of Duncan, purported to convey such mineral interest in his deed to Parker & Co. It does not appear that either Parker & Co. or the Glenmary Coal & Coke Company ever attempted any mining operations on the 342 acres, nor that they, or either of them, ever did any act indicating a purpose to take possession of the minerals as such, nor does it appear that John S. Diden, the vendor of Parker & Co., during his twenty-eight years' possession of the

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surface of the land, ever did or attempted any such act. It is said that no actual possession of the coal itself was claimed. The decision of the court was, simply, that John S. Diden's possession of the surface for more than seven years, claiming the land under color of title (his father's will), openly, continuously, and adversely, inured to the benefit of his conveyee, Parker & Co., and through them to the Glenmary Coal & Coke Company, and that he had thus perfected the title of the latter to the underlying coal, by the statute of limitations before suit brought. It should be stated that McBurney claimed the mineral not under Julian F. Scott, but under Thomas B. Eastland, who had the true title. The fact that the parties were claiming under different chains of title was referred to in the opinion as having an influence in the solution of the question.

The court adopted the opinion of the court of chancery appeals, from which court the case had been brought by appeal. It is said in that opinion:

"In this case the conflict is not between parties claiming under the same chain of title, but between parties claiming under entirely separate and distinct chains of title. It appears to us that the better, safer, and most sensible rule would be to adopt the rule established in those cases where there is a joint or mixed possession by heirs and life tenants, or by mother and child, guardian and ward, etc., where the possessions are held to be consistent, and in harmony, and all under the same title. . . . We think the better rule and principle is to hold that such possession by a man who

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has conveyed the mineral rights to others is a possession in their interest, and in harmony with them, as well as for himself. If it be not so held in this case, we have this peculiar condition of matters presented: Diden by his deed conveyed to Parker & Co., and through them to the defendant Glenmary Coal & Coke Company, the mineral rights and mining rights; that is, the right to go upon this land and take out these minerals, and to use the necessary timber on the land for mining purposes. Now, these parties are claiming under him and under his warranty, and if they be ousted therefrom, can hold him liable on his warranty, and the loss will be occasioned by the entry of a party against whom he has been asserting an adverse right for a period of more than a quarter of a century. In addition to that, Diden has certainly been holding the land for all purposes as against the complainants, and is entitled to hold all of it for all purposes, unless it be held that the coal has been severed, so as not to protect it; and if it should be decided under this holding that the complainants have not lost their title to the coal, by what right or on what principle could it be held that they can enter upon the surface in order to reach the coal, and can it be held that they have the right to use the timber upon the land for mining purposes? We think, in a case of this kind, as heretofore said, the better holding would be that the possession of Diden inured to the benefit of his grantee, to whom the mineral and mining rights were transferred. . . . We are of opinion, as stated, that the better and more

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sensible rule, and the rule which will best promote and carry out the purpose and policy of the statute of limitations, by quieting titles, etc., will be to hold that the possession by a grantor (of a mineral interest and mining rights in property) of the surface will inure to the benefit of the grantee of such rights as against third parties; and such is our holding."

This court after setting out the foregoing added:

"We are of opinion that the court of chancery appeals announces a better rule than that indicated in the authorities we have cited from other States. We are the better contented with this rule in view of the fact that there would be no way of putting complainant in possession of those minerals if his title thereto should be established. The adverse possession of the defendants has deprived the complainant of an easement to remove this coal from defendants' premises, even if it belonged to complainant. Complainant could not assert a way of necessity over the land of defendant Diden to remove the minerals."

After very careful reflection and a re-examination of the authorities, we are convinced this decision is unsound.

When John S. Diden conveyed the mineral interest to Parker & Co., he severed it (if not already severed by the reservation in Julian F. Scott's deed) from the surface as completely as if the land had been cut into two distinct tracts. *Catlin Coal Co. v. Lloyd*, 176 Ill., 275, 52 N. E., 144; *Ames v. Ames*, 160 Ill., 599, 43 N. E., 592; *New Jersey Zinc Co. v. New Jersey Franklinite*

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Co., 13 N. J. Eq., 322, 341-343; *Gill v. Fletcher*, 74 Ohio St., 295, 78 N. E., 433, 113 Am. St. Rep., 962; *Lillibridge v. Lackawana, etc., Co.*, 143 Pa., 293, 22 Atl., 1035, 13 L. R. A., 627, 24 Am. St. Rep., 544; *Gordon v. Park*, supra; *Wallace v. Elm Grove Coal Co.*, supra. Possession of the surface thereafter could not be possession of the severed mineral. *Gordon v. Park*, supra; *Wallace v. Elm Grove Coal Co.*, supra; *Louisville, etc., R. Co. v. Massey*, 136 Ala., 156, 33 South., 896, 96 Am. St. Rep., 17; *Catlin Coal Co. v. Lloyd*, supra; *Manning v. Kansas, etc., Coal Co.*, 181 Mo., 359, 377-379, 81 S. W., 140; *Caldwell v. Copeland*, 37 Pa., 427, 78 Am. Dec., 436; *Armstrong v. Caldwell*, 53 Pa., 284; *Huss v. Jacobs*, 210 Pa., 145, 59 Atl., 991; *Virginia Coal, etc., Co. v. Kelly*, 93 Va., 332, 24 S. E., 1020. This is bound to be true, if, as all the authorities hold, distinct estates are created by the severance. And it also follows from the undoubted rule that the acts of possession required for the surface, and those for the minerals are different; the latter requiring some form of mining, or activities directly related thereto.

“The surface owner setting up the statute must establish a possession of the mine, as such, independently of his possession of the surface. Such a possession must be actual, notorious, exclusive, continuous, peaceable, and hostile for the statutory period. And in these respects the surface owner is in no better position than a stranger. . . . Actual possession is taken by the opening of mines and carrying on mining opera-

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tions." *Gordon v. Park*, supra; *Barringer & Adams* on the Law of Mines and Mining, p. 569.

It is true, as held in *Finnegan v. Stineman*, 5 Pa. Super. Ct., 124, that the true owner cannot by executing and recording a deed purporting to convey the mineral, so sever it as to interfere with an adverse possession already begun on the whole tract, or use such deed, as a substitute for a possessory action. The case is altogether different, however, when the person in possession himself surrenders that possession to another. No one doubts that if one in adverse possession of land should convey a distinct part of the tract to another, and place him in possession, or after his conveyance should abandon that possession, he could no longer claim that part of the land under the statute. It is true his vendee might receive the possession, and his subsequent possession, united with the prior possession of his vendor, might make out the seven years' adverse possession for him. So, too, if the land should be divided, by the supposed vendor, into two estates by severance of the mineral, the vendee might unite the possession existing before the severance with an immediate and continuous possession of the mineral after the severance, and so make out title to the mineral under the statute, but there would have to be appropriate possession of the latter; the statute could not be satisfied merely by the vendor's possession of the surface.

When it is said in the opinion in the *McBurney Case* that the court should not follow the decisions of other States on the point, but should hold as the better rule

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that the possession of the surface was likewise possession of the severed mineral lying within the earth, not only was the uniform rule prevailing in all other jurisdictions disregarded, but our own prior case of *Murray v. Allred* as well, and something declared possession which, assuming the existence of a severance of the mineral from the surface, could not, in the nature of things, be possession, any more than one could be said to be in possession of the surface of land which he had conveyed to another, and on which his foot no longer rested. The decision in *McBurney v. Coal & Coke Co.* on the point stated is therefore unsound, and on that point must be overruled.

The decision could have been based only on one or the other of these two propositions, viz.: that a conveyance of the mineral did not sever it from the surface, or that if the conveyance did effect such severance, still the possession of the surface was also a possession of the severed mineral. Both propositions are without doubt in conflict with all the authorities, and against the common law. The common law binds courts only less firmly than statutes. Its rules are gradually, almost imperceptibly, enlarged or contracted by the courts, by construction, in the course of their application to new States of fact, to meet the needs of a progressive civilization, but it is not allowable to change them *per saltum*. This can be done only by legislation. It is true the courts of a State may refuse to follow even a consensus of authority in all other States, or even a perfectly well-recognized rule of the common-

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law, on the ground that it is not suited to the genius of the State, or is opposed to its public policy. We know of no public policy of this State, however, which makes the settled rule of other mining States on the subject referred to inapplicable here. The public policy of a State is shown by its statutes and decisions. We have no applicable statute, but *Murray v. Allred*, supra, is evidence that we have no public policy which forbids the rule therein applied. That case has been approved in other States, and cited in their decisions, also in the text-books, and it was not in terms overruled, or dissented from, in *McBurney v. Glenmary Coal & Coke Co.*, supra.

In respect of the point in the case last mentioned, to the effect that the question should be settled on the theory of a joint or mixed possession, we say such possession is always actual, and the matter for decision always is, to which one of several so in actual possession shall the law impute the legal or true possession, and the answer is, to that one who owns the legal title. *Welcker v. Staples*, 88 Tenn., 49, 12 S. W., 340, 17 Am. St. Rep., 869; *Ramsey v. Quillen*, 5 Lea (73 Tenn.), 184. In the first-cited case, the persons in actual possession were the husband and wife, and their children, with the legal title in the wife and children, and in the second, the husband and wife, with the title in the wife. In *McBurney v. Glenmary Coal & Coke Co.* there was no one in possession of the surface except John S. Diden; so the theory of joint or mixed possession could not be applicable. The only theory left is that Diden being

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in possession of the surface, he was by force of that fact also in possession of the underlying coal, and held it as a trustee for the vendee thereof. But this is but another form of the theory which we have already shown is inadmissible, since it assumes that possession of the surface is possession of mineral severed from the surface.

We add one more observation. It was said in that case that it would be futile to give McBurney a recovery for the mineral because the statute had run against him as to the surface, and he could not therefore reach the mineral. This was not a sound reason for refusing to declare his right. Moreover there could be no obstacle to his reaching such minerals by mining or tunneling under the land in question from adjoining lands obtained by purchase or lease. But this would have been unnecessary, because when John S. Diden conveyed the minerals, he, by implication of law, conveyed the right to obtain access to them through the surface, and as against that purpose no longer held the surface adversely. That was an incident to the conveyance of the mineral right, and became a part of that right when severed.

As to the point that McBurney's claim was under another chain of title, we think undue importance was attached to it. The severance was made by Diden himself, thereby depriving himself of the possession of the minerals, and it was at last only a question of possession. Another view of the matter is, that inasmuch as John S. Diden claimed ultimately under Julian F.

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Scott, and he had reserved the mineral interest in the deed which he made to Duncan, there was a severance of the mineral at the beginning of John S. Diden's title, with the incidental right of access reserved, but he never had color to the mineral interest, and therefore no sort of possession of it.

The result is that, *Murray v. Allred*, supra, is reinstated as authority, and following that case, and the authorities on which it is based, and others in accord, we hold that complainants did not acquire the mineral interest in the 177 acres, under the statute of limitations, or otherwise.

We are constrained to the same conclusion, in respect of the twenty-three acres, on the grounds stated in the early part of the opinion, that it does not appear that the land in question, or how much of it, was ever granted by this State or the State of North Carolina, as required by section 1 of chapter 28 of the Acts of 1819.

Therefore the whole bill must be dismissed at complainants' cost.

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LEA v. LOUISVILLE & N. R. Co. *et al.*

(Nashville. December Term, 1915.)

1. EMINENT DOMAIN. Highways. Use for other public purposes. Underground pipes.

Laying water pipes under a county highway creates an additional servitude upon the fee interest, for which the abutting owner may recover, notwithstanding the county has consented to such action so far as its easement in the surface is concerned. (*Post*, pp. 568-571.)

Acts cited and construed: Acts 1907, ch. 254.

2. CONSTITUTIONAL LAW.. Eminent domain. Class legislation. Discrimination against particular corporations.

Acts 1907, ch. 254, authorizing any railroad company, now or hereafter owning or operating a railroad to condemn for reservoir purposes, etc., does not violate Const. art. 11, sec. 8, or Const. U. S. Amend. 14, sec. 1, prohibiting class legislation, although it does not confer the same right upon new railroad companies until they own or operate a railroad. (*Post*, p. 571.)

Cases cited and approved: *Stratton v. Morris*, 89 Tenn., 497; *Dugger v. Ins. Co.*, 95 Tenn., 245; *Harbison v. Iron Co.*, 105 Tenn., 421; *Condon v. Maloney*, 108 Tenn., 82; *Scott v. Marley*, 124 Tenn., 388.

Constitution cited and construed: Art. 11, sec. 8.

3. EMINENT DOMAIN. Extent of power. Statutory construction.

Under Acts 1907, ch. 254, authorizing a railroad to condemn a pipe line between a running stream and its reservoir or tanks, a pipe line may be condemned between a reservoir formed by damming a running stream and the railroad's tanks. (*Post*, p. 571.)

4. EMINENT DOMAIN. Proceedings to take. Offenses. Threatened misuser.

Where a railroad company has been granted eminent domain power for pipe line purposes, an owner cannot defeat con-

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demnation proceedings upon the ground that the railroad intends to divert some of the water to purposes not contemplated by the statute. (*Post*, pp. 571, 572.)

5. EMINENT DOMAIN. Rights acquired. Misuser. Who may question.

Where a railroad has power to condemn for pipe line purposes, only the State may question its diversion of the water to purposes not contemplated by the statute. (*Post*, pp. 571, 572.)

Cases cited and approved: *Barrow v. Turnpike Co.*, 28 Tenn., 304; *Heiskell v. Chickasaw Lodge*, 87 Tenn., 668; *Railroad Co. v. Transportation Co.*, 128 Tenn., 277.

6. EMINENT DOMAIN. Nature. Acts constituting. Appropriation.

Where a pipe line was located along a highway and the pipe laid thereon awaiting the digging of ditches in which it was to be placed, *held* the abutting owners' fee interest in the highway was taken so as to authorize him to bring suit under Shannon's Code, secs. 1866, 1867. (*Post*, pp. 573-575.)

Case cited and approved: *Calahan v. Dunn*, 78 Cal., 366.

7. INJUNCTION. Dissolution. Dismissal of bill.

There was no error in dismissing a bill upon a hearing to dissolve a preliminary injunction, where the parties treated the cause as if submitted on bill, answer, and proof. (*Post*, pp. 575, 576.)

8. EMINENT DOMAIN. Remedies of owner. Injunction. Failure to institute condemnation proceedings.

Where defendant railroad company had the right to condemn complainant's fee interest in a highway, and had already taken possession of it, complainant could not enjoin completion of the work, although no condemnation proceedings had been started. (*Post*, p. 576.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—W. C. CHERRY, Special Chancellor.

Lea v. Louisville & N. R. Co.

E. A. PRICE and PITTS & McCONNICO, for appellant.

KEERLE & SEAY and F. M. BASS, for appellees.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The bill was filed to obtain an injunction restraining the defendant above named, and the Nashville, Chattanooga & St. Louis Railway Company, and the Lewisburg & Northern Railroad Company, from laying a line of water pipe within the limits of Granny White Pike, at any point where the fee in the pike was owned by any one or more of the complainants.

Mrs. Lea owned a tract of land known as "Lealand," lying to the east of the pike, and her property line extended to the middle of the pike. She also owned an undivided interest in a tract bounding the pike on the west side, and the east line of this tract extended to the middle of the pike. Her co-complainants, Perry and wife, Sawyers and wife, and Uhl and wife, owned separate tracts, bounding the pike on the west side. The east line of these latter tracts extended to the middle of the pike.

The bill also sought to restrain defendants from so erecting or constructing a dam south and southwest of the Lealand tract as to cause any part of that tract to be overflowed by water escaping over the dam.

For some time prior to the filing of the bill the defendant Lewisburg & Northern Railroad Company had been engaged in the construction of a dam located to the

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south and southwest of Lealand, and on land owned by said railroad company contiguous to the Lealand tract, the purpose of the company being by means of the dam to make a reservoir or artificial lake. This lake was to cover about eighty-three acres of land. It was to have a capacity sufficient to hold more than 400,000,000 gallons of water. The dam was so planned that it would impound on the eighty-three acres of the company's lands the waters of Otter creek, and its tributaries.

The dam and the several tracts of land already mentioned lie south of the city of Nashville, in Davidson county. The Lewisburg & Northern Railroad Company was, at the same time it was engaged in the construction of the dam, also engaged in the construction of extensive switchyards, known as the "Radnor yards." Located within these yards it had some forty or more miles of railroad tracks, which it had constructed for its railroad purposes. The Radnor yards and the reservoir site were about three miles apart, and the plan of the railroad company was to connect the two by an iron water pipe, and thus supply its tanks in the Radnor yards with water necessary for the operation of these yards, and the various railroad purposes to be there conducted.

The Lewisburg & Northern Railroad Company, having theretofore secured the consent of the county of Davidson so to do, proceeded to take possession of the western margin of the pike, to the extent of going thereon, surveying a line for the laying of its pipe

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and distributing the necessary pipe for the construction of the line throughout the entire distance along the pike on each side of which the lands owned by the complainants abutted. And while the railroad company was thus proceeding to connect the reservoir with the Radnor yards by its pipe line, its operations were restrained by service upon it of the injunction in this cause.

The Nashville, Chattanooga & St. Louis Railway Company, by its separate answer, denied all corporate connection either with the building of the dam, or with the laying of the pipe mentioned in the bill, and after the filing of its answer, it appears to have been an entirely inactive party in the cause.

By the joint answer of the other two defendants, the material allegations of the original bill were put at issue. The Lewisburg & Northern Railroad Company, by this answer, assumed the entire responsibility of the building of the dam and the laying down of the pipe line, and the proposed construction thereof. The Louisville and Nashville Railroad Company admitted that it was the owner of more than a majority of the capital stock of the Nashville, Chattanooga & St. Louis Railway Company, and of all the capital stock of the Lewisburg & Northern Railroad Company, except a few shares vested in the officers and directors of the latter company, but the Louisville & Nashville Railroad Company disaffirmed any corporate responsibility for the construction of the reservoir, or the pipe line.

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After the cause was at issue, defendants moved to dissolve the injunction on bill and answer, and while the pleadings were being read to the court on the hearing of this motion the Louisville & Nashville Railroad Company, and its codefendant, the Lewisburg & Northern Railroad Company, moved the court for leave to amend their answer. This motion was granted, and the answer was amended as of date July 31, 1914. Thereafter, on August 21, 1914, the motion to dissolve was disposed of by the court as shown by the following minute entry:

"This cause came on to be heard on this August, 21, 1914, and on previous days of the term, upon the motion of defendants to dissolve the preliminary injunction heretofore granted herein upon bill and answer, and thereupon the cause was heard upon the pleadings, the affidavits permitted to be filed by the court in support and in opposition to said motion, the certified copies of deeds filed by complainants, and the briefs and oral arguments of counsel.

"Upon consideration of all of which the court is of the opinion and doth order, adjudge, and decree as follows:

"1. That the boundary line of complainants' property is the middle line of the Granny White turnpike, and that complainants are the owners of the fee in the Granny White turnpike as alleged in the complainants' bill, subject only to an easement in the county over the surface of the pike for travel; and that the only effect of the permission obtained from the county of Davidson

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for the railroad to lay pipe in said pike was to legalize the railroad company's interference with the county's easement or right of travel upon the surface of the pike.

"2. That the laying of the pipe line in the Granny White turnpike creates and constitutes an additional servitude upon the property of the complainants, and that complainants are not affected by the permission of the county to the defendant or its agents.

"3. That all of the negotiations between the agents of the defendants and Mrs. Lea with regard to the going through Lealand had no application to the laying or passage of the pipe line along the Granny White turnpike, and that there is no estoppel operative against complainant, Mrs. Lea, in this case, and that this is disclosed by defendants' own answer and affidavits.

"4. That chapter 254 of the Acts of 1907 is constitutional, and the construction placed upon said statute by defendants is a proper one, and that under the statute defendants possess the right of eminent domain to condemn the right of way for the pipe line in question.

"5. That the mere fact that the defendant Lewisburg & Northern Railroad has permanently fixed a location for this pipe line and laid down the pipes constitute a taking of complainants' property, and that taking occurred prior to the filing of this bill; and the damages to be suffered by complainants are not irreparable.

"6. That all of the facts in the case that are material in the view of the court are conceded by the opposing

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parties, either in the pleadings or in the affidavits; and, there being no material difference in the pleadings, and in the affidavits of the defendants and the complainants with reference to any material facts, the court, of its own motion, hereby dismisses complainants' bill and dissolves the injunction heretofore granted in this cause."

To that part of the decree set out in its first, second, and third paragraphs, the defendants Louisville & Nashville and Lewisburg & Northern Railroad Companies each excepted, and prayed therefrom an appeal to the court of civil appeals, which was granted.

To that part of the decree set out in its fourth, fifth, and sixth paragraphs, the complainants excepted, and prayed an appeal to the court of civil appeals, which was granted.

The respective appeals were perfected.

In the court of civil appeals complainants moved to transfer the cause to this court, on the ground that the constitutionality of a statute of this State was involved. The motion was granted and the cause transferred, and the complainant has filed its assignments of error in this court.

Incorporated in the bill of exceptions are various matters of evidence in the form of affidavits, letters, maps, etc. These were read on the hearing of the motion without objection or exception. They were read by, and on behalf of, the respective parties. Some of these matters were incorporated into the answer of the defendants by the amendment noted *supra*, and some

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of them, on behalf of complainants, were apparently treated as parts of the bill without formal amendment.

The chancellor was correct in the rulings made as set out in the first, second, and third paragraphs of the decree hereinfore set out. In fact, no serious insistence to the contrary is made by the appellant railroad companies, although, as already stated, they appealed from those parts of the decree. This brings us to a consideration of those parts of the decree from which the complainants appealed, to wit, its paragraphs 4, 5 and 6.

We will first consider the points made by complainants in respect of their insistence that the chancellor was in error in the conclusions reached by him, as set out in the fourth paragraph of the decree.

Chapter 254, Acts of 1907, reads:

“An act extending the powers of railroad companies and corporations owning or operating, or which may hereafter own or operate, a railroad, or any part thereof in the State of Tennessee, to condemn property to provide water for their use as such.

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that any railroad company or corporation owning or operating a railroad or any part thereof in Tennessee or that may hereafter do so, whether chartered under the laws of the State of Tennessee, or under the laws of any other State or States, be, and it is hereby authorized and empowered to condemn, under the laws of eminent domain, property for a cite for a reservoir or tank, also the use of the water

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from any running stream, and also a way on, in and along which to lay pipe line or lines to convey water to its reservoir or tanks whenever the same or any part of them may be needed for the purpose of such railroad: provided, such property, running streams, or rights of way shall not be taken or condemned without just compensation to the owner or owners; and, provided, further, that the rights herein conferred shall be subject to all the restrictions and accompanied by all the rights and powers of the law and practice in force in this State on the subject of eminent domain.

“Provided, however, that the powers herein conferred shall be exercised by railroad companies only for the purpose of erecting and maintaining tanks and reservoirs for the purpose of operating trains; and, provided, further, that the provisions of this act shall not apply to springs or private ponds.”

“Sec. 2. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

“Passed April 4, 1907.”

Complainants insist that this act is unlawful class legislation, and as such that it is in contravention of article 11, section 8, of the Constitution of this State, and of section 1, of the Fourteenth Amendment of the Constitution of the United States. This insistence is based on the idea that the power to condemn, by the act conferred, is confined to the railroad companies, or corporations owning or operating a railroad, or any part thereof, in Tennessee, at the time of the passage of the

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act, or such companies or corporations as might own or operate a railroad or any part thereof in Tennessee after the passage of the act, and that the act, while embracing within its application such railroad companies, does not extend to, or confer, such power—

“upon a new railroad company engaged for the first time in the construction, or becoming the owner of a railroad or any part thereof, in Tennessee.”

There is no merit in this point. The act does, of course, apply as well to a new railroad company or corporation as to an old one; but it does not apply until there is such corporation, “owning or operating a railroad, or any part thereof, in Tennessee;” nor can we see any good reason why it should. Indeed, every sound reason seems to indicate that the act is broad enough in its application. Its classification, as we see it, is entirely reasonable; nor can we see that it is in any sense arbitrary or capricious. It applies equally to all such companies or corporations who are in, or who may come into, the like situation and circumstances, constituting the reason for, and the basis of, the classification which the act makes; and we think the act comes, in its classification, fully up to the standard required by our cases. *Stratton v. Morris*, 89 Tenn. (5 Pick.), 497, 15 S. W., 87, 12 L. R. A., 70; *Dugger v. Insurance Co.*, 95 Tenn. (11 Pick.), 245, 32 S. W., 5, 28 L. R. A., 796; *Harbison v. Iron Co.*, 103 Tenn. (19 Pick.), 421, 53 S. W., 955, 56 L. R. A., 316, 76 Am. St. Rep., 682; *Condon v. Maloney*, 108 Tenn. (24 Pick.), 82, 65 S. W., 871; *Scott v. Marley*, 124 Tenn. (16 Cates), 388, 137 S. W., 492.

Passing to the next point, it is seen that, conceding the validity of the act, the power conferred is:

“The condemnation under the law of eminent domain, of property for a site for a reservoir or tank, also the use of the water from any running stream, and also a way on, in and along which to lay pipe line or lines to convey water to its reservoir or tanks whenever the same or any of them may be needed for the purpose of such railroad.”

Complainants insist that the power conferred by the statute does not include the condemnation of a way, in and along Granny White turnpike in which to lay a pipe line in order to connect the reservoir with the tanks of the railroad company in its Radnor yards, so that water would flow from the reservoir to the tanks.

This insistence is unsound. It is clear upon the record that the water in the reservoir is that of a running stream or streams, merely impounded by a dam. As already stated, the water of the running stream is not entirely stopped in its natural flow. That flow is merely impeded by the dam, to the end that a larger body of water resulting from the natural flow may be collected at the point called the reservoir; but it is clear that the scheme contemplates the confinement at such point only of so much water as the reservoir will hold, the purpose being that the surplus shall continue in its natural flow through a spillway.

The water taken from the reservoir by the pipes is therefore running water, and water taken from a run-

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ning stream, and falls literally within the power conferred by the act. Beyond a doubt on this record the water planned to be conducted by the pipes is needed for the purpose of the railroad company in its Radnor yards, and for the operation of its trains. It is said by complainants that the record also shows a purpose on the part of the Lewisburg & Northern Railroad Company to allow the other two corporate defendants the use of the water and the Radnor yards for their individual corporate purposes.

Suppose this be true, yet it is manifest that the statute conferred power on the Lewisburg & Northern Railroad Company to condemn the way for a pipe line for its own purposes, and we are unable to see how this right can be defeated at the instance of complainants on the ground that, after the right is exercised, the condemnor may make an improper use of the water conveyed to its Radnor yards, or of the yards themselves. If, after having exercised the power to condemn, the condemnor should make an improper use of the water in its yards, or of the yards, the sovereign State which had conferred the power could complain of the abuse, but not these complainants. *Barrow v. Nashville, etc., Turnpike Co.*, 28 Tenn. (9 Humph.), 304; *Heiskell v. Chickasaw Lodge*, 87 Tenn. (3 Pick.), 668, 11 S. W., 825, 4 L. R. A., 699; *Railroad Co. v. Transportation Co.*, 128 Tenn. (1 Thomp.) 277, 160 S. W. 522.

We, therefore, overrule all of complainants' assignments of error in respect of the fourth paragraph of the decree.

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While complainants by their second assignment of error question the correctness of the conclusion set out in the fifth paragraph of the decree, yet in complainants' brief, we find this admission:

"We now want to say after a mature and deliberate consideration of the matter, that if the Lewisburg & Northern Railroad Company really possesses the power of eminent domain to condemn the right of way for this pipe line through complainants' property in the bed of Granny White turnpike, we do not care to insist that the special chancellor was in error in holding that the Lewisburg & Northern Railroad Company had actually taken possession of this right of way, in the sense of sections 1866 and 1867 of Shannon's Code, because such insistence upon our part would be very narrow and unsubstantial, and if successfully maintained by us, could hereafter probably be obviated and rendered futile by the Lewisburg & Northern Railroad Company, if said company really possesses the power of eminent domain to condemn the right of way for this pipe line."

The authorities are not altogether in harmony on the point as to what constitutes a taking of private property for public use within the meaning of the statutes conferring the right of eminent domain. According to some of the cases there must be a taking altogether, a seizure, a direct appropriation and dispossession of the owner, such a taking as divests the owner of title and control of the property taken, and an unqualified appropriation of it to the public, but the weight of author-

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ity is against this strict construction; and, as said in Cyc., vol. 15, p. 652:

"The general rule (deducible from the cases) seems to be that any destruction, restriction, or interruption of the common and necessary use and enjoyment of the property in a lawful manner may constitute a taking. It is not necessary that the owner be wholly deprived of the use of his property. The term "taking" should not be limited to the absolute conversion of property, nor it is material whether the property is removed from the possession of the owner, or in any respect changes hands. It is not necessary that the possession be an actual physical taking. To constitute a taking the power of disposal need not be interfered with. The entire or any partial destruction of private property for public use is an appropriation of it within the meaning of the Constitution. To constitute an appropriation within the meaning of the Fifth Amendment to the United States Constitution, the taking must be of a kind from which some benefit is to be anticipated."

See cases cited in the notes as supporting the text quoted, *supra*. See, also, *Callahan v. Dunn*, 78 Cal., 366, 20 Pac., 737.

Without discussing the authorities or the facts at length, we are satisfied from the facts which are without material dispute that the Lewisburg & Northern Railroad Company had, prior to the filing of the bill in this cause, fixed a permanent location for its pipe line along the margin of Granny White turnpike where complainants' property abutted thereon, and that

possession of the margin of the pike so fixed as the location of the pipe line had been taken by the laying down of heavy iron pipe thereon intended to be laid in place where it should permanently remain after the digging of the ditch necessary in order to place the pipe below the surface of the turnpike. These facts, we think, amount to a taking under our statutes, and the authorities above referred to.

Paragraph 6 of the decree is assailed by the third, fourth and fifth of complainants' assignments of error, yet in complainants' brief, it is said:

"Since we have so frankly conceded that if the Lewisburg & Northern Railroad Company really possesses the right of eminent domain to condemn the right of way for its pipe line, the special chancellor did not commit a reversible error in dissolving the preliminary injunction so far as the pipe-line feature of the case is concerned," etc.

The above concession was a very proper one on this record. It is clear that the parties and the chancellor, without saying so in terms, treated the cause as submitted on bill, answer and proof. The bill of exceptions shows the order in which the proof was submitted, and while its submission was somewhat informal in character, this course seems to have been taken by mutual consent, and certainly without objection. The case seems to have been fully developed, and, looking at the matter as it was treated by both court and counsel in the proceedings which led to the final decree, we perceive no error in the action of the chancellor where-

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by he not only dissolved the injunction but also dismissed the bill.

It was no doubt clear to him, and is very clear to us, that when complainants failed in their insistence that the railroad company had no right to condemn, there could be no debate on the point that the remedy of complainants was at law, and not in equity.

The chancellor was therefore correct in remitting complainants to a legal forum, since they were clearly without right to equitable relief. Treated as the cause was, there is no error in the decree of the chancellor, and it is affirmed, at complainants' cost.

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F. G. MONTGOMERY v. THE STATE. *

(Nashville. December Term, 1915.)

1. INTOXICATING LIQUORS. Illegal sales. Fraternal club.

One directing the dispensing of intoxicating drinks as "president" of a club composed mostly of drinkers, the front door of which was kept locked, and the glass panels thereof kept opaque by deep paint, the members entering by a side door from a dark unlighted alley, they being sworn to secrecy and paying for the expenses and "president's" salary by proceeds of coupon books for liquor payments, the club having obtained a federal retail liquor license, *held* guilty of violation of the law, forbidding selling intoxicating liquor within four miles of an institution of learning. (*Post*, pp. 578-584.)

Case cited and distinguished: *Moriarty v. State*, 122 Tenn., 440.

Case cited and approved: *Tenn. Club of Memphis v. Dwyer*, 79 Tenn., 452.

2. INTOXICATING LIQUORS. Prosecutions. Presumptions.

In prosecution for illegal retail liquor selling, by statute there is a presumption of guilt arising from the possession of a United States internal revenue license for the retail sale of intoxicating liquors. (*Post*, pp. 584, 585.)

Case cited and approved: *Hermitage Club v. Shelton*, 104 Tenn., 101.

3. CRIMINAL LAW. Appeal. Reversal. Failure to instruct. Statute.

Where refusal to give proper instructions does not affect the result, the verdict being fully in accord with the merits of the case, the case must be affirmed, under Acts 1911, ch. 32, providing that no verdict or judgment shall be set aside or any criminal cause for error in the charge, etc., unless in the opinion of the appellate court it affirmatively appears the error has affected the result. (*Post*, p. 585.)

Acts cited and construed: Acts 1911, ch. 32.

*As to applicability of liquor laws to social clubs dispensing liquors to members, see notes in 12 L. R. A. (N. S.), 519; 20 L. R. A. (N. S.), 1095; 23 L. R. A. (N. S.), 192; 38 L. R. A. (N. S.), 101 and L. R. A., 1915C, 876.

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FROM DAVIDSON.

Appeal from the Criminal Court of Davidson County.
—A. B. NEIL, Judge.

CHESTER K. HART, for appellant.

FRANK M. THOMPSON, Attorney-General for the State.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted in the criminal court of Davidson county for violation of the four-mile law; that is, selling intoxicating liquors within four miles of an institution of learning. 'He was convicted, and has appealed to this court. His defense is that his act does not fall within the statute because he was merely dispensing liquors as an officer, "president" and "custodian" of the Cumberland Fraternal Club, a fraternal organization whose habitat was at 208 Broad Street, in the city of Nashville.

The evidence is, in substance, as follows: The club is composed of 400 members, mostly drinking men, but there are a few who do not drink. The front entrance is on Broad street, but it is never used; the door is kept locked; and its glass panels are so deeply painted over that no one from the outside can look through them into

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the club rooms. The members enter only through a side door which opens out on an alley, which is unlighted, and dark at night. Inside there is a buffet at which are dispensed, to members only, beer and whiskey, by the porters of the club, under the direction of the "president." The members pay for these drinks with coupons detached from coupon books which are sold to them. It is so arranged that the proceeds of these books pay in full, and no more, the cost of the liquors, the wages of the porters, and the salary of the "president," who dispenses them. His salary is \$25 per week. No books are kept. When the coupons are sold the money is placed in the "president's pocket, and it is paid out from the same receptacle. He testifies that the club has a bank account, but he knows not the name of the bank, nor, so far as this record shows, does any one else know. There is an initiation fee of \$1, and annual dues of \$1, per member. The purpose of this fund is the payment of all expenses other than those for drinks, and service of drinks. This fund is collected by Mr. Sherry, the secretary, but he was not offered in evidence, and the president does not know what Mr. Sherry has done with the money. The rent of the building is \$40 per month, aggregating \$480, which exceeds the income from dues to the extent of \$80. There is also an outstanding debt of \$500 for furniture, purchased from Mr. Sherry, the current secretary, who had run a "soft-drink" business in the same place, which was broken up under the nuisance

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law. The "president" testifies that it is a part of the plan to pay sick benefits to members, but that no funds are provided for this purpose. As to the membership, some of the most respectable men of the city belong, and any respectable man may become a member, and careful inquiry is made on this head when application comes in; but all are required to take an oath of secrecy. There is no other initiation rite. There is a reading and writing room furnished with large, easy, leather bottom chairs and a leather davenport, and with paper, pens, and ink and tables to write on. There are six other rooms, upstairs, and they are fitted up as bedrooms, where members may recline if they wish, and where some of them do take afternoon naps. Sometimes, also, when the weather is bad, members sleep in these rooms all night. Some daily papers are taken for the use of the members, also several magazines, Puck, Judge, Munsey's, Red Book, the Cosmopolitan, the Literary Digest, and, it is said, quite a number of other magazines but their names are not given. Some of the members often meet in the rooms and talk and read the papers and magazines. There are some costly and beautiful pictures on the walls, loaned by one of the members, and the whole house is fitted up for the ease and comfort of the members, for which no extra charge is made. The "president" sees to it that there is no loud talking, or rude or boisterous behavior of any kind, and that there is no gambling nor even card playing. The club obtained from the United States government what is popularly called

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a federal retail liquor license, that is, a receipt for the internal revenue tax, describing the business of the "Cumberland Fraternal Club," as that of "retail liquor dealer," at 208 Broad Street, Nashville, Tenn. The "president" testifies, however, that this was procured only to avoid trouble with the federal government. Besides beer and whisky, the club keeps on hand soda water, and other "soft drinks," sandwiches, etc. Only a relatively small quantity of liquors is kept on hand. There are, as stated, several members who do not drink at all. They come to the clubhouse often, and read, or lie down and take a nap, or meet the other members for purposes of sociability, or to make acquaintanceships.

In the foregoing statement we have used the present tense, as if the club were still an existing institution, but it appears from the evidence that since the present prosecution was begun, the club had been proceeded against as a public nuisance, on the ground that it was selling whisky, and had been put out of business by a permanent injunction.

When the officers raided the place, preliminary to the present proceeding, they found in the room where the buffet was, "President" Montgomery and a negro porter; and also several men, all members of the club, sitting at tables drinking beer. They found several dozen bottles of beer on ice, also two casks of beer stored in the place. In an iron safe, not locked at the time, they found several bottles of whisky, quarts, pints, and half pints. Some whisky was also found on

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shelves behind the drinking tables. There were no bar fixtures. There was an ice box, and there were several tables and chairs in the room. The place in question had formerly been occupied as a saloon, during the period when saloons were in operation in the city of Nashville. After that time, and before the club occupied the house, it had the reputation of being a "bootlegging joint," and had borne the same reputation while the club was occupying it.

The first error assigned is that there is no evidence to support the verdict, and the second that the evidence preponderates against the verdict.

Both must be overruled. We think it very clear that the chief purpose of the club was the selling and drinking of intoxicating liquors. The other things were mere incidents, added to give the enterprise an appearance of lawfulness. Else why the oath of secrecy, the closed and locked front door, with its glass panels so thickly coated with paint that no one could see through; why the secret side door opening upon the dark, unlighted alley, through which all the "members" entered and left the building? We were told long ago that those whose deeds are evil love darkness rather than light, and that men must be judged by what they do, "by their fruits shall ye know them." Can the incriminating evidence recited be covered over and lost to view by the fact that many respectable men visited the place, and that there were six beds for 400 men? Or by the fact that some of the members, a few, were not drinking men, and attended only to

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meet persons whom they might see, to form acquaintanceships and the like, or to read the papers and magazines, or take naps on the beds? These entered and left by the same dark way which those used who came for drinks only. They saw the shaded and locked front door, and they too took the oath of secrecy. So, it matters not that they did not drink; they were full participants in the scheme and as guilty as the rest. The club was a mere device to mask the sale and purchase of intoxicating liquors. It was simply a conveniently appointed saloon, with a selected and numerous list of regular, reliable patrons. The case does not fall under *Moriarty v. State*, 122 Tenn., 440, 124 S. W., 1016, 25 L. R. A. (N. S.), 1252, nor *Tennessee Club of Memphis v. Dwyer*, 11 Lea, 452, 47 Am. Rep., 298.

Without referring to any other, a sufficient distinction is that the funds used in buying the liquors were those of the plaintiff in error, realized by the sale of the coupon books, and those received by sale of liquors, which funds were appropriated by him, in their totality, without any accounting to the club, in any form whatsoever. So that, even if the club could, under the facts, be held a *bona fide* fraternal organization, the same facts would show that he simply carried on a saloon business within it for his sole benefit. But in the cases referred to there was no doubt that the organizations were *bona fide* social bodies, and the dispensing of liquors was but a small incident of their existence. Here the case is far different, and well justifies the warning of our late much-loved brother, Chief Justice Beard, in *Moriarty v. State*, *supra*, viz:

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"It may be proper to observe, in conclusion, that it is a matter of common knowledge, of which we may take judicial notice, that since the legislative enactment of the various statutes, extending from time to time the territorial scope within which intoxicating liquors cannot be legally sold, clubs have sprung up in great numbers in different localities, and obtained charters, whose apparent purpose is to evade, if possible, under the forms of law, the effect of these statutes. It is hardly necessary to say that such a club can find no warrant for its existence in the present holding. Whenever in any case, the legality of its action . . . is challenged by the State, it will be the duty of the court to scrutinize closely, in order to see that no such device is attended with success. In every case, when the serving of liquor to members, or others, is the principal purpose, or one of the chief objects, of such an organization, and not a mere incident, or when it is sold for a profit, this being carried into a general fund for meeting the expenses, or into a special fund for the payment of salaries, or for distribution among its members, or otherwise, the disguise should and will be uncovered, and the club and its members made amenable to the law."

As stated, in the *Moriarty Case*, not only was it clear that the organization there under examination was a *bona fide* social and charitable body, but there was no contention by the State to the contrary, as pointedly remarked by the Chief Justice. Furthermore, in drawing the distinction between that case and *Hermitage*

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Club v. Shelton, 104 Tenn., 101, 56 S. W., 838, it was pointed out that in the latter case, while not in the former, the plaintiff in error had to overcome the statutory presumption of guilt arising from the possession of a United States internal revenue license for the retail sale of intoxicating liquor. The plaintiff in error labors under the weight of the same presumption here, and he has not removed it by the facts presented. On the contrary, he has but strengthened and confirmed it.

The remaining assignments of error are based on the charge of the trial judge, and his refusal to change certain instructions offered.

Without copying these instructions here, we may say they were such as should have been given by the trial judge, but under the facts proven we are very clearly of the opinion that the failure to give these did not affect the result, and that the verdict of the jury is fully in accord with the merits of the case. Under such circumstance it is our duty not to reverse but to affirm. Acts 1911, chapter 32.

The last assignment is that there was affirmative error in the charge as given. In this view we do not concur.

The result is the judgment of the trial court is affirmed.

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EDWARD SCRUGGS *et ux.* v. MAYBERRY *et al.* *

(Nashville, December Term, 1915.)

1. **WILLS. Construction. Estates created.**

A will devising land to the son without mention of heirs or children or character of estate is a direct devise in fee. (*Post*, pp. 595, 596.)

Cases cited and approved: Middleton v. Smith, 41 Tenn., 144; Kirk v. Furgerson, 46 Tenn., 479; Wynne v. Wynne, 56 Tenn., 308; Frank v. Frank, 120 Tenn., 569; Hatzenberger v. Weaver, 110 Tenn., 620; Speight v. Askins, 118 Tenn., 749.

Codes cited and construed: Sec. 5, ch. 22 (1784); Sec. 3673 (S.).

2. **WILLS. Construction. Estates created.**

A will devising lands to the wife during her life and on her death to the son and the heirs of his body, but if he should die without heirs, to his sister, and the heirs of her body, is a direct devise in fee to the son, since at common law such a devise would be an estate tail, and under Shannon's Code, sec. 3673, all such estates are made estates in fee simple. (*Post*, pp. 595, 596.)

3. **WILLS. Construction. Estates created. Limitations.**

Where a devise of a fee simple is followed by condition that if the devisee should die without heirs the land should go to his sister, it is not impaired by such limitation where the devisee survives the testator, since, to invoke the limitation, the devisee must die before the testator's death. (*Post*, pp. 595, 596.)

4. **WILLS. Construction. Estates created..**

Where a devise of the fee is followed by a devise over in case the devisee dies without issue or without children, or without heirs of the body, to invoke the limitation, the death of the devisee must occur prior to that of the testator. (*Post*, pp. 596, 597.)

Cases cited and distinguished: Meacham v. Graham, 98 Tenn., 190; Vaughn v. Cator, 85 Tenn., 302.

*Upon the question of effect of conveyance by husband to wife as creating separate estate, see comprehensive note in 69 L. R. A. 370; and as to sale of expectancy by prospective heir, see note in 25 L. R. A. (N. S.), 436.

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5. WILLS. Construction. Conflict in rules.

The rule (Shannon's Code, sec. 3675) that where a devise of the fee is followed by devise over if the devisee dies without issue, to invoke the limitation the devisee's death must occur prior to that of the testator, and the rule that if a life estate is granted with unlimited power of disposition of the whole estate and remainder created in the same property, the latter is void, are not in conflict. (*Post*, p. 597.)

Case cited and disapproved: *Frank v. Frank*, 120 Tenn., 569.

6. WILLS. Construction. Estates created. Power of disposition.

Powers merely incidental and to be inferred from the fact of ownership are not the unlimited or absolute power of disposition which, if given to a life tenant, makes a subsequent remainder void, but such absolute power must be given in express terms or impliedly by added words. (*Post*, pp. 597-600.)

Case cited and approved: *Overton v. Lea*, 108 Tenn., 505.

7. WILLS. Estates created. Particular words.

The rule that where a devise of the fee is followed by a devise over if the devisee dies without issue, to invoke the second devise the devisee must predecease the testator, applies even where at the time of making the will the devisee was only eight years old, and the testator died within one year thereafter. (*Post*, p. 600.)

Case cited and approved: *Frank v. Frank*, 120 Tenn., 575.

8. WILLS. Estates created. Devisees over.

Where the devise is to a son and to his children, although they are not yet in being and may never be, it is the preferred construction that the son takes the life estate with remainder to the children. (*Post*, pp. 600, 601.)

Cases cited and approved: *Turner v. Ivie*, 52 Tenn., 222; *Beecher v. Hicks*, 75 Tenn., 207; *Blackburn v. Blackburn*, 109 Tenn., 675.

9. WILLS. Estates created. Remainders.

The devise to a son and to his children, and if he dies without children then to his sister and her children, creates a life es-

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tate in the son with remainder to the children, and at birth of a child the remainder would vest, subject to open and let in after-born children. (*Post*, pp. 600, 601.)

10. WILLS. Construction. Technical words. "Heirs of the body."

When technical words are used in a will they are presumed to be used in a technical sense, and before another meaning can be attached to them that meaning must clearly appear, so that unless it clearly appears that the testator used the words "heirs of the body" as meaning children, they will not be so construed. (*Post*, pp. 601-603.)

Cases cited and approved: *Loving v. Hunter*, 16 Tenn., 4; *Settle v. Settle*, 29 Tenn., 474; *Vaden v. Hance*, 38 Tenn., 300; *Clopton v. Clopton*, 49 Tenn., 31; *Owen v. Hancock*, 38 Tenn., 563; *Pierce v. Ridley*, 60 Tenn., 145; *Middleton v. Smith*, 41 Tenn., 144; *Kirk v. Furgerson*, 46 Tenn., 479; *Skillin v. Lloyd*, 16 Tenn., 564; *Balch v. Johnson*, 106 Tenn., 249; *Bingham v. Weller*, 113 Tenn., 70; *Ward v. Saunders*, 35 Tenn., 587; *Wood v. Polk*, 59 Tenn., 220; *Linn v. Alexander*, 59 Pa., 43; *Pearsol v. Maxwell (C. C.)*, 68 Fed., 513; *Lanham v. Wilson (Ky.)*, 22 S. W., 438; *Wilkerson v. Clark*, 80 Ga., 367; *Brant v. Gelston (N. Y.)*, 2 John Cas., 384; *Shuttle & Weaver Land Imp. Co. v. Barker*, 178, Ala., 366.

11. WILLS. Construction. Technical words. Rules of property.

Since Shannon's Code, sec. 3673, making all estates tail fee-simple estates, creates a rule of property, its application ought not to be rendered difficult by a latitudinarian construction of familiar words, the technical significance of which uniformly creates an estate tail at common law. (*Post*, pp. 603, 604.)

Code cited and construed: Sec. 3673(S.).

12. WILLS. Construction. Particular words.

Provisions of will *held* not to indicate that the words "heirs of the body" were intended to be used in other than the technical significance. (*Post*, pp. 603, 604.)

13. HUSBAND AND WIFE. Deeds. Effect.

A deed made directly by the husband to the wife creates in her a separate estate. (*Post*, pp. 604, 605.)

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Cases cited and approved: Barnham v. Le Master, 110 Tenn., 638; Funkhouser v. Fowler, 117 Tenn., 539; Ferguson v. Booth, 128 Tenn., 259; Travis v. Sitz, 185 S. W., 1075.

14. HUSBAND AND WIFE. Perpetuities. Deeds. Effect.

Where the husband conveyed land to the wife, the deed providing that neither should dispose of it during the life of the other, but that the husband should be entitled to control and manage it, the husband became the wife's trustee for her separate estate, such a restraint on the power of alienation being void if the estate is general, but not if the estate is the separate one of the wife. (*Post*, pp. 604, 605.)

15. HUSBAND AND WIFE. Deeds. Effect.

Under a deed from the husband to the wife, he to retain the use and possession of the property, but neither to have the right to dispose of it, and in the event of his death, the wife to control and manage the property, and in the event of her death after the grantor's death, the property to be divided among the children, and in the event of her death during the life of the grantor, the conveyance to be void, the wife has an estate only during the joint lives of herself and husband, and the interest of the children under the deed is contingent only. (*Post*, pp. 605, 607.)

16. HUSBAND AND WIFE. Deeds. Effect.

Such a deed conveys an estate *in praesenti*, the interest of the wife being immediate. (*Post*, pp. 605-607.)

17. DIVORCE. Decree. Vested and contingent interests.

A decree in a divorce case operating as a deed and describing a vested remainder interest in lands conveys nothing where the sole interest is a contingent remainder, and is not cured by a further description including any other property or estate of the defendant. (*Post*, pp. 607, 608.)

Case cited and approved: Taylor v. Swafford, 122 Tenn., 303.

18. DIVORCE. Decree. Vested and contingent interests.

A decree attempting to convey a contingent remainder is of no effects, since an instrument purporting to convey such an interest amounts only to an agreement to convey which may be enforced when the contingency happens. (*Post*, pp. 607, 608.)

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19. PARTIES. Joinder. Antagonistic interests.

That a husband and wife have under a will various interests in property, the extent of which in either of them depends upon his survival of the other, does not make them antagonistic so as to make their joinder as plaintiffs improper. (*Post*, p. 608.)

Case cited and approved: *Bigley v. Watson*, 98 Tenn., 353.

20. QUIETING TITLE. Right to remedy. Title of plaintiff.

Where the husband conveyed land to the wife subject to divestiture should she predecease him, and to the limitation that he should control and use the land during his life, they were both proper parties to sue to remove a cloud from the title, the equitable title being in her and the legal in him. (*Post*, p. 608.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.
—JOHN ALLISON, Chancellor.

J. T. MILLER, H. S. STOKES and T. T. MCCARLEY, for appellants.

PITTS & McCONNICO, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

William Scruggs died in 1859, after having made his will, which, so far as necessary to quote, reads:

“I give . . . to my wife, Margaret, one-half of my landed estate during her natural life. . . .

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The half of land not given to my wife, I give to Edward Scruggs, son of William and wife Sarah G., . . . and the part my wife has while she lives, after her death, to him, said Edward and the heirs of his body, and if he should die without heirs, then the land I have given him to go to his sister, Lucinda, and her heirs, that is, the heirs of her body."

In the year 1878 Edward Scruggs executed a deed, which, so far as necessary to reproduce, is as follows:

"For and in consideration of the love and affection I have for my wife, Alice Scruggs . . . and the additional considerations of \$1.00 to me, Edward Scruggs, paid, I have granted and conveyed to my wife, Alice Scruggs, the following real estate [describing a tract of 300 acres]. I likewise grant and convey to my wife, Alice Scruggs, a tract of fifty-four acres lying in Williamson county. . . . Likewise I grant and convey to my wife, Alice my remainder right and title to 354 acres. . . . Mrs. Margaret Bright [formerly Margaret Scruggs, widow of testator in the above-mentioned will] has a life estate in both these tracts. I, Edward, have the remainder title which is hereby conveyed to my wife, Alice. . . . This conveyance is made to my wife, Alice, with the following limitations: I, Edward, am to retain the use and possession of said property, the right and power to cultivate, rent, or lease said property in such manner and for such uses and purposes as I may think proper, but neither Alice or myself shall have the right to sell the said property. In the event of my death, my wife

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surviving, then she, the said Alice, is to take the control and management of said property, and apply the usufruct, rents, crops, etc., to her and my children's support and maintenance. In the event of Alice's death, I being dead, then the property thus conveyed to be divided equally among all my children, and their heirs. In the event of my wife becoming a widow and afterwards marrying, then all the property thus conveyed shall belong [to] and be divided among my children and their representatives. In the event of my wife dying leaving me surviving, then this conveyance shall be void and the title thus conveyed shall reinvest in [me] the said Edward Scruggs."

The bill alleges that complainant Edward Scruggs, the maker of the deed just copied, has four living children, that one of these is Edward G. Scruggs, and that the wife of the latter by proceedings in the Third circuit court of Davidson county, had obtained a divorce from him, and had secured a decree for alimony. So much of this decree as should be recited reads:

"That the defendant Edward G. Scruggs is the owner of a one-fourth vested remainder interest in a tract of land (describing the Scruggs' lands); . . . that the petitioner should recover of the defendant alimony and (the court) allows as alimony in this case a one-half of the vested remainder interest owned by the said defendant Edward G. Scruggs in the above-described tract of land, and a one-half in any other property or estate of the defendant. It is by the court

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ordered, adjudged, and decreed that the said one-half interest in the aforesaid land of the said Edward G. Scruggs, and one-eighth in the entire estate, subject to the life estate of the father, be and the same is hereby divested out of the said Edward G. Scruggs, and vested in Mrs. Katherine Reid Scruggs, in fee simple to her sole and separate use, and free from the debts, contracts, or control of any husband she may ever have."

There was in said case also a fee of \$600 allowed to Mr. Harry S. Stokes, the solicitor for Mrs. Katherine Reid Scruggs, and it was—

"therefore adjudged that the said Harry S. Stokes have and recover the sum of \$600 of the defendant Edward G. Scruggs, and to secure and make certain the payment of said sum of money, the amount is declared a lien upon the remaining one-eighth interest of the said Edward G. Scruggs, in said property, and will so remain until the same is paid and discharged."

So it is that the Third circuit court of Davidson county decreed absolutely to the wife of Edward G. Scruggs one undivided half of what she claims is, or was, his undivided one-fourth vested interest in remainder in the lands described dependent on the life of his father, and decreed a lien in favor of her solicitor for \$600 on the other half. She claims that his interest under the deed made by his father was a vested remainder in an undivided one-fourth of the land.

The complainants in the present bill, Edward Scruggs and wife, Alice, the father and mother of the

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defendant Edward G. Scruggs, claim in the bill that the legal effect of the deed above mentioned—

“was to vest the title, right of possession, and control of said land in the said Alice for her life only upon the condition and contingency that she should survive the grantor, complainant Edward Scruggs; and that no title or interest of the children or heirs of complainant Edward Scruggs in said land could vest in them, except upon the same condition and contingency, that is, the death of complainant Edward in the lifetime of complainant Alice; and such contingency not yet having happened, that no interest has vested in said children or heirs, and none may ever vest under said deed.”

After setting out the decree for divorce and alimony above mentioned, it was charged that Edward G. Scruggs was never at any time vested with any interest in the said lands, in any form whatsoever, and that the decree for alimony created a cloud on complainants' title; that defendant Katherine Reid Scruggs and her representatives are threatening to sell or mortgage the supposed one-eighth interest, and thus further complicate matters. It was therefore prayed that the will of William Scruggs, and the deed made by Edward Scruggs, be construed, the rights of the parties declared, and that it be adjudged that Katherine Reid Scruggs acquired no interest in the land by the clause referred to, that that decree be declared void, and removed as a cloud, and that on final hearing she be perpetually enjoined from claiming any interest in the land mentioned under the decree above referred to.

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The defendant Katherine Reid Scruggs and Harry S. Stokes filed a demurrer to the bill, and upon that being overruled, answered, insisting upon their construction of the deed of Edward Scruggs which we have already stated, and in addition that even under the will of William Scruggs, the said Edward took only a life estate, with the remainder to his children, and that under that instrument Edward G. Scruggs was entitled to a vested undivided one-fourth interest in remainder in the lands.

The chancellor held against both contentions of the defendants Katherine Reid Scruggs and Mr. Harry S. Stokes, and decreed in favor of the complainant. An appeal was prosecuted to the court of civil appeals, and there the decree of the chancellor was affirmed. The case was then brought to this court under the writ of *certiorari*.

We are of opinion that under the will of William Scruggs there was devised to Edward Scruggs, directly, in fee the half of the lands not incumbered by the life estate of the wife. The same result must follow as to the remainder in the half interest incumbered by the wife's life estate, if the words "heirs of the body" occurring in that devise be technically construed, since a devise to A. and his bodily heirs would create an estate tail at common law (*Middleton v. Smith*, 1 Cold. [41 Tenn.], 144; *Kirk v. Furgerson*, 6 Cold. [46 Tenn.], 479; *Wynne v. Wynne*, 9 Heisk. [56 Tenn.], 308), and by our statute (1784, chapter 22, sec. 5; Shan. Code, sec. 3673; *Speight v. Askins*, 118 Tenn., 749, 102 S. W., 74),

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all such estates are turned into estates in fee simple. Nor is the fee-simple estate in the present instance, if it be such, impaired by the clause, "and if he should die without heirs," then to Lucinda, since under the rule of construction and of property that obtains in this State, these words would import a death in the lifetime of the testator (*Frank v. Frank*, 120 Tenn., 569, 111 S. W., 1119; *Katzenberger v. Weaver*, 110 Tenn., 620, 75 S. W., 937), and it appears that Edward Scruggs survived the testator.

It is insisted by defendants, in opposition to this construction, that the words, "heirs of the body" should be interpreted to mean "children." Let this be assumed, would the result be changed? The language of the will under consideration in *Frank v. Frank*, *supra*, was:

"Should any of my sons die without issue, his or their share shall also revert to my children then living, their heirs and assigns forever."

The court held that this language fell within the rule quoted from Jarman on Wills:

"If there is an immediate gift to A., and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in event of A's death before the testator."

In *Katzenberger v. Weaver*, *supra*, it was held that the following language was covered by the rule:

"In case any of my children herein named, shall die leaving a child or children at the time of his or her death," then over to other persons indicated.

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In *Meacham v. Graham*, 98 Tenn., 190, 196, 39 S. W., 12, 13, the language of the will was:

"In the event of her death without living children," then over.

In *Vaughn v. Cator*, 85 Tenn., 302, 2 S. W., 262, the language was:

"In the event Basil Smith dies without lawful issue," then to others.

In each of these cases it was held that the words used meant death before the testator.

It is next insisted that the rule laid down by Shan. Code, section 3675, controls instead of the decisions cited, but the same point was made in *Frank v. Frank*, and disallowed. 120 Tenn., 569, 576, 577, 111 S. W., 1119.

It is insisted that the rule cannot apply unless there be an unlimited power of disposition given the first taker. There is no necessary connection between the two rules. It is claimed that such relation is fully shown in *Meacham v. Graham*, and *Vaughn v. Cator*, and necessarily implied in *Katzenberger v. Weaver* and *Frank v. Frank*. This is a misconception of those cases. The one rule is that if, for example, a life estate be granted to A., with unlimited power of disposition of the whole estate, and in the same instrument there be granted to another a remainder over in the same property, the remainder is void, since the unlimited power of disposition vested in the first taker enables him to destroy the remainder. Therefore it is regarded as futile. The law will not recognize vain

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things, and so declares that to the first taker belongs the whole estate. The other rule has just been stated. Comparing them it is seen there is no necessary connection. It is true that the facts in *Meacham v. Graham* furnished a basis for the application of both rules. The chancellor decided in favor of the daughter's ownership under the rule we have quoted from Jarman (98 Tenn., 207, 39 S. W. 12), while the court of chancery appeals reached the same result on the ground of an absolute power of disposition vested in the daughter (98 Tenn., 201, 39 S. W., 12). This court said on the page last cited that the chancellor and the court of chancery appeals had arrived at the same result, "by different holdings, but not, as we think, by necessarily inconsistent or contrary theories, under the special facts of this case." It is true that a statement in the opinion on pages 207, 208, combining the two rules, and also a third in one sentence, tends to confuse the matter, and to obscure what had been previously stated on the subject of two of the rules separately at pages 201, 202, and the second paragraph on page 207, but an examination of the authorities cited will show that the first five of them applied solely to the rule in respect of dying before the testator, the next two solely to the absolute power of disposition, and the last one to the rule against any presumption to cut down by a subsequent provision a fee already given by a prior one. So it is, all three rules were united in the one sentence, and the authorities for each cited in the aggregate without showing how they applied separately to the dif-

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ferent elements contained in the sentence. The sentence does not read clearly, and there was evidently something omitted from it in the printing. Certain it is, the rules are quite distinct. In *Vaughn v. Cator*, there was no power of disposition in terms given to Basil Smith, or other power except such as is to be inferred from the mere fact of ownership and that is not the kind of power contemplated by the rule as to absolute or unlimited power of disposition. Such absolute power must be given in express terms or impliedly by added words. *Overton v. Lea*, 108 Tenn., 505, 545, 68 S. W., 250, and authorities cited. What is said on the subject in the opinion in *Vaughn v. Cator*, was only *arguendo* in the way of demonstrating the inconvenience of a construction that would deny Basil Smith the absolute ownership if he survived the testator, since under a contrary construction it could not be determined until his death whether there would be lawful issue of him, and during perhaps a long life the possible ultimate destination of the property would be unknown, and in the meantime Basil Smith as owner could sell it. In the other two cases (*Katzenberger v. Weaver* and *Frank v. Frank*), not only was there no conferment of an unlimited or absolute power of disposition, in express terms, but no superadded words from which the power had to be necessarily inferred. We have seen that the power of disposition to be implied merely from ownership has no relation to the rule: We may add that from the discussion in *Katzenberger v. Weaver*, of the rule quoted from Jarman

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on Wills, there was no inkling of any kinship to it, near or remote, of the rule as to absolute power of disposition.

It is also claimed that the rule of *Frank v. Frank*, and kindred cases, cannot apply because at the date of the will Edward Scruggs was only eight years old, while William Scruggs was within a year of his death, and it cannot be supposed that he entertained the thought that he would survive the boy, or even that he would live long enough to see Edward married and the father of children. But there is no evidence as to the age of the testator, or that he had any forecast, or provision of his death to happen a year after the making of his will. For aught we know he may have been, when the will was executed, a man in his twenties or thirties and in perfect health. And see *Frank v. Frank*, 120 Tenn. at page 575, 111 S. W., 1119, discouraging inquiries of such a nature.

But it is urged that if the term "heirs of the body" should be construed to mean children, then the devise would be to Edward Scruggs and his children, and that under such a devise Edward would take a life estate with remainder to his children, although they were not yet in being, and might never be. Such is the preferred, and we may say is practically the construction given in this State when the devise is to one and his or her children, where there are yet no children in existence. *Turner v. Ivie*, 5 Heisk. (52 Tenn.), 222; *Beecher v. Hicks*, 7 Lea (75 Tenn.), 207, 212; *Blackburn v. Blackburn*, 109 Tenn., 675, 73 S. W., 109. But con-

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ceding this, will the situation under the present will be in anywise different? If the devise should be written, "to William Scruggs and his children, and if he die without children, then to his sister Lucinda, and her children," still the words "if he die" must mean under the rule "if he die during the life of the testator." On such death the title would go over as stated. If he survived the testator the devise would remain as written to William Scruggs and his children, which would be construed to William for life with remainder to his children, and on the birth of a child the remainder would vest, subject to open and let in after-born children. And this is the case before us, it appearing as already stated that four children have been born to complainants William Scruggs and his wife, Alice, all of whom are living. One of these is Edward G. Scruggs, whose interest in this property, it is claimed, was decreed to his wife in the divorce proceeding.

So it becomes important to determine whether the words "heirs of the body" in the will of William Scruggs should be held to mean children.

It is true that these words "heirs of the body" have in this State several times been held equivalent to the term "children." In the first of these cases to which our attention has been drawn (*Loving v. Hunter*, 8 Yerg. [16 Tenn.], 4), this interpretation was the result of special language contained in the will, influenced to some degree likewise by the desire of the court to take the particular case out of the rule in *Shelley's Case*, to which considerable hostility was shown. In the three

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cases immediately following (*Settle v. Settle*, 10 Humph., 474, *Vaden v. Hance*, 1 Head, 300, and *Clopton v. Clopton*, 2 Heisk., 31, 34, 35) substantially the same language was found, that is, the determining word "lend," and these cases were all based on *Loving v. Hunter*. In *Owen v. Hancock*, 1 Head, 563-565, the language was quite special, note particularly the bottom line of page 565. In *Pierce v. Ridley*, 1 Baxt., 145, 25 Am. Rep., 769, the language was very special, the sons being made trustees for the "heirs of their bodies," and this was held to indicate that children were referred to. On the contrary, the technical meaning of the term has been repeatedly applied. *Middleton v. Smith*, 1 Cold. (41 Tenn.), 144; *Kirk v. Furgerson*, supra; *Skillin v. Lloyd*, 6 Cold., 564; *Wynne v. Wynne*, supra; *Balch v. Johnson*, 106 Tenn., 249, 61 S. W., 289; *Bingham v. Weller*, 113 Tenn., 70-77, 81 S. W., 843, 69 L. R. A., 370, 106 Am. St. Rep., 803; *Speight v. Askins*, supra. And it is held in *Ward v. Saunders*, 3 Sneed (35 Tenn.), 387, 389, that when the term is applied to real estate, it must be construed according to its strict legal meaning. And the rule is general when technical words are used in a will, they are presumed to be used in a technical sense, and before another meaning can be attached to them, that meaning must clearly appear, *Wood v. Polk*, 12 Heisk., 220, 224, 228. The same principle has been applied in other jurisdictions to the words we now have under examination. *Linn v. Alexander*, 59 Pa., 43; *Pearsol v. Maxwell* (C. C.), 68 Fed., 513, 514; *Lanham v. Wilson* (Ky), 22 S. W., 438; *Wil-*

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kerson v. Clark, 80 Ga., 367, 7 S. E., 319, 12 Am. St. Rep., 258; *Brant v. Gelston* (N. Y.), 2 John. Cas., 384; *Shuttle & Weaver Land Imp. Co. v. Barker*, 178 Ala., 366, 60 South., 157, 158.

A special reason applying in this State in favor of strict construction of these words where realty is involved arises out of our statute above referred to reproduced in Shan. Code, section 3673, which turns estates tail into fee-simple estates. This statute creates a rule of property and its application ought not to be rendered difficult by a latitudinarian construction of familiar words, the technical signification of which uniformly creates an estate tail at common law. It ought to be reasonably easy for the examiner of titles to determine when he has before him a case or instance falling under the statute. This is the dictate of public policy for the security of titles. When the effort is made to find in these words a meaning different from that technical signification, nearly always litigation arises. It is true that in some instances public policy has been compelled to give way before what seemed to the court a clear purpose of the testator to use the terms referred to in a nontechnical sense, or as meaning children. This course of construction, however, should not be too much indulged, for the reasons already stated. Now turning to the will before us, we see nothing in it sufficiently clear to overturn the true technical meaning of the terms. We are referred to a wholly distinct paragraph of the will in which it is said the testator used, with respect to certain property de-

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vised to his wife, the word "heirs" in a strictly accurate way, showing that he understood its legal meaning; that he employed the same word in the next paragraph, that referred to the devisee William Scruggs in such way as to make it absurd if he intended it in its technical sense. That is to say, passing over to William Scruggs' sister Lucinda, the estate if he should die without heirs, when in law she would be his heir in case he died without children and hence she would have to die to inherit. The rule is that it is not competent, generally speaking, to construe one clause by another, especially when they relate to different subjects and are neither grammatically nor logically connected. *Wood v. Polk*, supra. When we refer to the paragraph itself in which the devise of land to William Scruggs is found, we there discover that he attaches the meaning of heirs of the body to the term heirs, and it is clearly perceived in the clause "then the land I have given him to go to his sister Lucinda, and her heirs that is, the heirs of her body," Reference is made to some language of the will immediately following the language we have just quoted, in which the testator devises certain slaves, but this part of the will throws no light whatever upon the meaning further than that already shown by the part of the will which we have copied, because the same words are repeated.

As to the deed: The conveyance having been made by the husband directly to the wife, it created in her a separate estate. *Barnham v. Le Master*, 110 Tenn., 638, 75 S. W., 1045, 69 L. R. A., 353; *Funkhouser v.*

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Fowler, 117 Tenn., 539, 101 S. W., 769; *Ferguson v. Booth*, 128 Tenn., 259, 268, 269, 160, S. W., 67, Ann. Cas., 1915C, 1079. The husband by operation of law became her trustee, and the powers reserved to him must be understood in that sense, otherwise they would be repugnant to the grant, and therefore void. The absolute restraint on the power of alienation would also be void if the interest conveyed were otherwise than a separate estate. A separate estate may be so qualified, but not a general estate. *Travis v. Sitz* (Nashville, December term, 1915), 185 S. W., 1075.

Under a true construction of the deed, the intention was that the estate so conveyed to the wife should continue only during the joint lives of the husband and wife, pending which term he was to act as her trustee, in the manner just stated. Upon his death, prior to her own, she was to have an estate for her own life, but subject to a trust duty on her part to manage the property and apply the avails to the support of herself and the children of Edward Scruggs, burdened, however, with the condition subsequent that in case she should contract a second marriage, and should thus cease to be his widow, her estate should cease, and the land should at once be divided among his children, and that the same result should follow her death subsequent to that of her husband. It is perceived that the estate of the wife for her own life, as well as all interest of the children, hinged upon the husband dying first. In the event the wife should die first she was to have nothing save the estate first mentioned for the term of the joint

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lives, and the children could take nothing at all; but the whole estate immediately upon the death of the wife would revert to the husband, Edward Scruggs, or, rather, speaking more correctly, as will be presently seen, he would be in of his original title; there being no dislodgement of it through the happening of the possible event of his dying prior to his wife. Recurring to the thought interrupted by the last clause, it is to be observed that the wife's estate for the term of her own life, and also the estate of the children, depended altogether upon the dubious event as to which would die first, the husband or the wife, and thus it is that the interests of the children were purely contingent; that is, under the terms of the deed they were to be contingent remaindermen dependent upon the coming into existence of the wife's estate for her own life, which in turn depended upon whether she should survive her husband. 4 Kent. Comm. marginal pages, 206-208. We do not think the contention a sound one, to the effect that the deed of Edward Scruggs conveyed nothing *in praesenti*, but that all of its provisions depended on his dying prior to the death of his wife. This view does not comport with the words of direct conveyance to his wife, and the reservation, so to speak, which he made as to his own control of the premises. If the intention was that nothing should pass save upon the happening of his own death, such a reservation would have been not only useless, but unaccountable. That provision occurring along with the words of direct conveyance to the wife, indicates beyond doubt, as we

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think, that the maker of the deed understood he was conveying an immediate interest to his wife. That estate was of the kind we have declared, subject, however, to the condition subsequent that upon the death of the husband prior to the death of the wife, the estate for the joint life of the two should cease, and an estate for her own life should arise, as already stated.

It is apparent from the principles stated that the decree in the divorce case purporting to transfer to Mrs. Katherine Reid Scruggs a vested remainder interest in the land did not convey her anything, since a description of a vested interest will not cover a contingent one. Nor is the difficulty bridged by the language of the decree, "and one-half in any other property or estate of the defendant." It is manifest that this language had no reference to the land in question, but to any other property or estate he might have. But let it be assumed that these general words applied to the contingent estate, the result would not be different, since under our authorities an instrument purporting to convey a contingent estate amounts only to an agreement to convey which may be enforced when the contingency happens and the vesting of the estate occurs. *Taylor v. Swafford*, 122 Tenn., 303, 307-312, 123 S. W., 350, 25 L. R. A. (N. S.), 442. It is true, as urged by counsel for the defendants, that a decree of court purporting to transfer title is equivalent to a conveyance *inter partes*, and will accordingly transmit the title; but the court has no power to make an agreement to convey for any one, so the decree was inoperative on the contingent remain-

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der. The same result must follow as to the lien attempted to be given to Mr. Stokes. The court could not decree a lien on a thing not yet in existence.

Before closing this opinion we should refer to two of the grounds of demurrer which are relied on in the assignments of error. One of these objects to the joint maintenance of the bill by the complainants on the grounds that their rights are antagonistic. It is clear from what has been said there is no antagonism. The other ground is that a bill to remove a cloud cannot be maintained because the complainants are without title. This is a mistaken view. The wife owns the estate for the joint lives of herself and husband protected by a trustee duty imposed on him for her benefit, and pending the contingency the title to the fee remains in him. *Bigley v. Watson*, 14 Pickle (98 Tenn.), 353, 363-372, 39 S. W., 525, 38 L. R. A., 679.

The result is that the decree of the court of civil appeals, on the grounds herein stated, is modified and affirmed.

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WALTER H. WHITE v. W. T. HATCHER, *et al.*

(Nashville. December Term, 1915.)

1. **BILLS AND NOTES. Negotiability. Certain time. Acceleration clause.**

A series of notes, payable at different times, but all to become due upon default of one are negotiable; the time of payment not being uncertain and contingent within Negotiable Instruments Act (Laws 1899, ch. 94) sec. 1, subsec. 3, and section 4, providing that an instrument is negotiable which is payable, "on or before a fixed or determinable future time specified therein." (*Post*, pp. 611-616.)

Acts cited and construed: Acts 1899, ch. 94, sec. 4; Acts 1899, ch. 94, subsec. 3, sec. 1.

Cases cited and approved: *Bank v. Russell*, 124 Tenn., 618; *Chicago Railway Equipment Co. v. Merchant's Nat. Bank*, 136 U. S., 268; *Thorp v. Mindeman*, 123 Wis., 149.

Case cited and distinguished: *Iowa Nat. Bank v. Carter*, 144 Iowa, 715.

2. **BILLS AND NOTES. Construction. Time of maturity. Acceleration clause.**

Such notes become due prior to their fixed maturities only at the option of a holder, and the hold of earlier notes, upon one of which default is made, can declare due and payable only the notes in his possession. (*Post*, p. 616.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to

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the Court of Civil Appeals from the Supreme Court.—
JOHN ALLISON, Chancellor.

HOWARD E. BROWN, for appellant.

HUME & CORNELIUS, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is a suit by the indorsee of several promissory notes, claiming to be an innocent holder. The defendant, the maker, admits the execution thereof, but avers failure of consideration and denies that the notes were negotiable.

There was a decree for the complainant in the court of civil appeals, that court finding him to be an innocent holder and construing the notes sued on to be negotiable instruments. A petition for *certiorari* has been granted and the cause argued here.

All the notes are of like effect and the first is, in words and figures, as follows:

“\$25.00.

September 15, 1913.

“Sixty days after date I promise to pay to the order of Jas. L. Akers twenty-five and no one hundredths dollars, with interest from date at the rate of six per cent. per annum, value received. This note is first of a series of twelve notes given for the purchase of one Marathon roadster automobile. The conditions of said purchase are, that the title to the above car is to remain in the hands of Jas. L. Akers, and so remain, until all the notes are paid in full with interest and cost

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of collection, including attorney's fees. In default of payment on any of the said notes, the whole shall become due, and the said Jas. L. Akers shall have the right to take possession of said car and sell the same for the balance of purchase money as provided by law.

W. T. HATCHER."

Indorsed on back:

"JAS. L. AKERS,"

It is only necessary to consider that provision of the notes declaring that the whole series shall become due upon default in payment of any one of said notes. Other provisions of the notes have been elsewhere considered by the court and held not to affect negotiability.

It is urged in behalf of the maker that the insertion of the words under consideration rendered the time of payment of the notes uncertain and contingent within the meaning of section 4, chapter 94, of the Acts of 1899. The Negotiable Instruments Act.

An instrument to be negotiable must be payable on demand, or at a fixed or determinable future time. Subsection 3, section 1, chapter 94, Acts 1899.

Further quoting from this statute:

"Sec. 4, An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

"1. At a fixed period after date or sight; or,

"2. On or before a fixed or determinable future time specified therein; or,

"3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

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“An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.”

The notes in suit are not payable on a contingency. They are payable at all events at the several times fixed on their faces. Any may become due earlier if the maker defaults in payment of one maturing previously.

The statute authorizes the execution of a negotiable instrument payable “on or before a fixed or determinable future time specified therein.” If thus expressed, negotiability is not impaired, although the maker may, if he find it convenient, treat the note as matured and discharge it any day after issuance.

Since under subsection 2, section 4, a negotiable note may be so written as to mature at any time before the fixed date, according to the convenience of the maker, may not this language of the statute be held to justify a more definite acceleration, dependent upon the act of the maker? Such a construction seems to be sound. Maturity would not be controlled by the whim or caprice of the holder, as where the latter was authorized to confess judgment for the maker, whenever the note was deemed insecure, and *Bank v. Russell*, 124 Tenn., 618, 139 S. W., 734, Ann. Cas., 1913A, 203, and like cases have no application.

The exact question before us came before the supreme court of the United States. While that case did not arise under the negotiable instruments statute, the court recognized the general rule of the law merchant to be that:

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“To constitute a valid promissory note it must be for the payment of money at some fixed time, or upon some event which must inevitably happen, and that its character as a promissory note cannot depend upon future events but solely upon its character when created.”

The court further recognized the negotiability of a note payable on or before a named date, and after a review of the decisions said:

“In view of these authorities, as well as upon principle, we adjudge that the negotiability of the notes in suit was not affected by the provision that upon the failure of the maker to pay any one of the notes of the series to which those in suit belonged, the rest should become due and payable to the holder.” *Chicago Railway Equipment Co. v. Merchants National Bank*, 136 U. S., 268 [10 Sup. Ct., 999], 34 L. Ed., 349.

It is to be noted that section 4 of the statute, defining “determinable future time” contains nothing materially different from the provisions of the law merchant, as these provisions were understood by the supreme court, and we are accordingly inclined to follow *Chicago Railway Equipment Co. v. Merchants' National Bank*, supra, and to hold the notes here in suit negotiable.

The Negotiable Instruments Act declares that the sum payable is a sum certain, although payable “by stated installments, with a provision that upon default in payment of any installment, or of interest, the whole shall become due,” Subsection 3, section 2.

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The supreme court of Wisconsin has held that a stipulation maturing a whole series of notes upon default in the payment of one does not impair negotiability. The Wisconsin statute, however, is slightly different from the Tennessee statute. The former statute has an additional subsection among those defining instruments payable at a determinable future time, as follows:

“4. At a fixed period after date or sight, though payable before then on a contingency.” St. Wis., 1915, section 1675-4.

This subsection seems to have been added to the statute to meet former decisions of the Wisconsin court, and the holding of the court referred to above is rested on the statute. *Thorp v. Mindeman*, 123 Wis., 149, 101 N. W., 417, 68 L. R. A., 146, 107 Am. St. Rep., 1003.

The case of *Iowa National Bank v. Carter* 144 Iowa, 715, 123 N. W., 237, is cited in opposition to the views we have indicated. The notes there held to be non-negotiable, in addition to the stipulation for the maturity of all upon default in respect to one, provided:

“If the said party of the first part shall sell, assign, dispose of, or attempt to sell, assign, dispose of, or remove from said county of Iowa without the consent of said Port Huron Machine Co., Ltd., the whole or any part of said goods or chattels, or if at any time the said party of the second part shall deem themselves insecure,”

—the whole of the notes should become due.

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The Iowa court might obviously have based its conclusion, as to the character of the notes, upon that portion of their contents just quoted, without consideration of the acceleration clause.

Roblee v. Union Stockyards National Bank, 69 Neb., 180, 95 N. W., 61, is not in point. In that case, by a collateral agreement, the maker undertook to make payments on the notes by the delivery of milk to a certain creamery, by which deliveries his notes were to be credited. The court said the transaction involved the payment of uncertain sums at uncertain times, that it would be impossible to tell how much would be due on these notes at maturity, and that such notes were not negotiable.

Inasmuch, therefore, as we find no direct construction of the Negotiable Instruments Act to the contrary, and, believing the act, in this particular, made no change in the rules of the law merchant, we prefer to follow the interpretation of the latter rules adopted by the supreme court in *Chicago Railway Equipment Co. v. Merchants' National Bank*, supra, and adjudge that the negotiability of a series of notes is not affected by a provision that upon the failure of the maker to pay any one of the notes, the whole of the series shall become due.

Such a result is undoubtedly desirable in furtherance of trade and industry. A conditional vendor, selling implements, equipment, and machinery, with lien or title retained, is thus protected against depreciation of his security, incident to its use. Purchase

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money notes, so secured, may be more readily marketed. The security being better, credit will be easier, and small enterprises may be organized and outfitted with less difficulty. It is said that these notes might find their ways into different hands, and that the holder of the later notes would not know it if default was made upon an earlier note; that such default would mature the whole series, and the holder of the later notes would thus unwittingly and perhaps unwillingly have the notes in his possession rendered past due.

The answer to this is that the provision that the series of notes shall become due upon the failure of the maker to pay any one of them means that such other notes shall become due at the option of the holder. *Chicago Railway Equipment Co. v. Merchants' National Bank*, supra. Unless the holder of the other notes so elects, said notes will not become due until their fixed maturities.

The holder of earlier notes, upon one of which default is made, can only declare due and payable the notes in his possession. His act cannot affect the notes in the possession of another.

Upon the whole case we think the correct result was reached by the court of civil appeals, and the decree of that court is affirmed.

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STATE *ex rel.* J. W. BARNES *v.* E. A. GARRETT. *

(Nashville. December Term, 1915.)

1. PARDON. Time of granting.. "Conviction."

Accused, found guilty, may be pardoned although appeal is pending, since in the provision of Const. art. 3, sec. 6, empowering the governor to pardon after conviction, "conviction" means verdict of guilty, not judgment or sentence; and the vacating or suspending of the judgment by appeal does not affect the verdict. (*Post*, pp. 619-626.)

Cases cited and approved: *Ex Parte Campion*, 79 Neb., 364; *People v. Marsh*, 125 Mich., 410; *Gilmore v. State*, 3 Okla. Cr., 639.

Cases cited and distinguished: *Smith v. State*, 74 Tenn., 637; *Parker v. State*, 103 Tenn., 547; *Commonwealth v. Lockwood*, 109 Mass., 353; *State v. Alexander*, 76 N. C., 231.

Codes cited and construed: Secs. 5595, 7199, 7201, 7028, 7252, 7250(S.).

Constitution cited and construed: Art. 3, sec. 6; Art. 8, Ch. 2, sec. 1; Art. 1, sec. 5 (1870).

2. CRIMINAL LAW. Pardon. Waiver.

A prisoner, pardoned pending appeal, who unsuccessfully moves to dismiss his appeal, and does not call the attention of the supreme court to his pardon, the case not being tried on its merits, but affirmed for want of bill of exceptions, and who on remand interposes his pardon in the court below, does not waive the pardon. (*Post*, pp. 626, 627.)

3. CRIMINAL LAW. Judicial notice. Pardon.

Courts do not judicially notice a pardon. (*Post*, pp. 626, 627.)

Cases cited and approved: *United States v. Wilson*, 7 Pet., 150; *People v. Marsh*, 125 Mich., 410.

*For authorities passing on the question of legislative power to grant pardon after conviction, see note in 54 L. R. A., 252.

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4. PARDON. Waiver.

Usually, if a prisoner fails to plead his pardon and puts himself on his trial, he waives the advantage of the pardon. (*Post*, pp. 626, 627.)

5. PARDON. Effect. Payment of costs.

A pardon does not release a convict from costs of the prosecution. (*Post*, pp. 627, 628.)

Case cited and approved: *Spellings v. State*, 99 Tenn., 201; *Smith v. State*, 74 Tenn., 637; *Henderson v. Walker*, 101 Tenn., 329.

FROM PICKETT.

Appeal from the Criminal Court of Pickett County.
—J. M. GARDENHIRE, Judge.

E. D. WHITE and J. L. McDONALD, for appellant.

W. H. SWIGGART, JR., Assistant Attorney-General,
for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

J. W. Barnes was indicted on a charge of carrying a pistol at the February, 1914, term of the criminal court of Pickett county. He was tried at the October, 1914, term of that court, fined \$50, and a jail sentence also imposed upon him. He appealed in error to the December, 1914, term of this court.

Pending the hearing of his case in this court, he was pardoned by the Governor, December 22, 1914. His

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case was heard here January 11, 1915, and the judgment below, with a slight correction, was affirmed, and the case remanded for execution of said judgment.

Prior to the hearing in this court, Barnes undertook to dismiss his appeal in error, which he was not allowed to do, no explanation of this motion being made to the court, and the attorney-general opposing the motion in order to have the judgment corrected as before noted.

The pardon that had been granted to Barnes was not called to the attention of this court in any manner on his former appeal. Upon the remand Barnes pleaded his pardon in the trial court, but that court was of opinion the pardon was ineffective, and ordered Barnes into custody to serve his sentence and to secure the payment of the fine and costs previously adjudged against him. From the last order, the court refused an appeal, and this petition for *habeas corpus* was then filed. The petition was dismissed, and the petitioner gave bond and appealed.

The principal question is upon the validity of the pardon issued under such circumstances.

The Constitution of Tennessee provides that the Governor "shall have power to grant reprieves, and pardons, after conviction, except in cases of impeachment." Article 3, section 6.

The State insists that the pardon, issued pending appeal in error to this court was not issued after conviction. The argument is that the appeal in error suspended the judgment against Barnes, that he did not

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stand convicted, and there was no conviction upon which a pardon might operate, pending the appeal.

The contrary contention is that the verdict of the jury against Barnes was a conviction; that he was convicted after verdict, and a lawful object of executive clemency, regardless of judgment—whether or not judgment had been entered, or, having been entered, had been suspended by appeal in error.

What meaning is to be attached to the word “conviction” in the section of the Constitution quoted?

In a *dictum* in *Smith v. State*, 74 Tenn. (6 Lea), 637, the court said:

“A conviction implies not simply a verdict, but also a judgment (see Bouv. Law Dict., title, Conviction); though we believe it has not generally been held that a judgment should be actually entered before a pardon can be interposed.”

In *Parker v. State*, 103 Tenn., 547, 53 S. W. 1092, there was a verdict of guilty and judgment entered thereupon, but defendant was released on bond pending motion for new trial. Prior to the filing of this motion, a pardon was granted, and the legality of the pardon was questioned on the ground that there had been no final judgment. We quote from the opinion:

“For the defendant, it is insisted that the term ‘conviction,’ as here used, signifies the adjudication or determination by the jury of the guilt or innocence of the defendant, and that after verdict and before judgment pronounced upon it a pardon may issue, but that in any event final judgment in this case passed upon the de-

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fendant after the verdict was returned by the jury, and hence the pardon could legally issue.

“The court is of opinion this contention is well made. The judgment of the court upon the verdict is in form a final one, without the necessity of any formal sentence. The conviction was one which did not require that a sentence of infamy be passed.”

Parker v. State, supra.

The learned justice delivering the opinion of the court in *Parker v. State* did not agree to the validity of the pardon. It does not distinctly appear what opinion the majority entertained as to the contention that conviction signified the determination of a defendant's guilt by the jury. The decision was apparently rested on the idea that final judgment had been entered on the verdict, which judgment had not been suspended.

In *Smith v. State*, supra, the court correctly declared the general rule to be that a judgment need not actually be entered before a pardon can be interposed. A conviction is held to accrue upon a verdict of guilty in all the cases of which we know, save *Ex parte Campion*, 79 Neb., 364, 112 N. W., 585, 11 L. R. A. (N. S.), 865, 126 Am. St. Rep., 667, 16 Ann. Cas., 319.

The *Campion Case* was really decided on other points, before the question here involved was reached, and the latter expressions of the court do not appear to have been at all necessary.

A very learned and elaborate discussion of the meaning of the word “conviction,” as used in the Massachu-

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setts Constitution (chapter 2, section 1, article 8), providing that:

“No charter of pardon granted by the governor, with advice of the council, before conviction, shall avail the party pleading the same,” etc.

—was undertaken by Mr. Justice Gray in *Commonwealth v. Lockwood*, 109 Mass., 333, 12 Am. Rep., 699. He reviewed authorities in England, Massachusetts, and elsewhere, and showed very plainly that:

“The ordinary legal meaning of ‘conviction’ when used to designate a particular stage of a criminal prosecution triable by jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while ‘judgment’ or ‘sentence’ is the appropriate word to denote the action of the court, before which trial is had, declaring the consequences to the convict of the fact thus ascertained.” *Commonwealth v. Lockwood*, supra.

It was accordingly held that a pardon granted after verdict of guilty and before sentence was valid.

The supreme court of North Carolina reached a like conclusion, where the Constitution authorized the governor to grant pardons “after conviction.” That court referred to the fact that in England the King might issue a pardon at any time, and, pointing out the reason for the constitutional provision, said:

“At common law the crown exercised the power of pardon at any time. The consequence was that crimes were smothered. The facts were not brought to light.

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The person charged was not brought before the public and required to answer the charge, and of course the public were dissatisfied. But under our Constitution and statute, the person charged must be brought before the public in a public trial, and face his accusers, and all the facts must appear, and the jury must find him guilty, and the court must sentence him. If he will then ask for pardon, he cannot deceive the pardoning power. The public are in possession of the facts and can resist his application. Nor is the pardoning power any longer irresponsible to the public, because he has to report the facts and his reasons for exercising the power." *State v. Alexander*, 76 N. C., 231, 22 Am. Rep., 675.

In the North Carolina case the defendant appealed before pardon, and it was argued that the appeal vacated the sentence or judgment, and no conviction remained. The court, however, thought the sentence or judgment was not part of the conviction, and the vacation of the judgment by appeal did not vacate the conviction, the verdict of the jury. The conviction would not be annulled unless the supreme court found error on the record, and awarded a new trial and a venire *de novo*. It was said that:

"Nothing can be a conviction but the verdict of a jury." *State v. Alexander*, supra.

In full accord with the Massachusetts and North Carolina cases are *People v. Marsh*, 125 Mich., 410, 84 N. W., 472, 51 L. R. A., 461, 84 Am. St. Rep., 584; *Gil-*

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more v. State, 3 Okl. Cr., 639, 108 Pac., 416, 139 Am. St. Rep., 981.

Looking to our statutes and to our Constitution, we find the word "conviction," as there used, does not ordinarily include nor imply judgment or sentence, but has a meaning entirely separate and apart from judgment or sentence.

In many of our statutes the term "conviction" is used to signify the jury's verdict of guilty, and as something precedent to, and distinct from, judgment or sentence.

Thus Shannon's Code, section 5595, provides that persons shall be rendered incompetent as witnesses by "conviction and sentence" for various crimes enumerated.

The following statutes further illustrate the point:

"Upon conviction of the crimes of abusing a female child, arson and felonious burning, burglary, etc., . . . it shall be part of the judgment of the court that the defendant be infamous, and be disqualified to give evidence, or to exercise the elective franchise." Shannon's Code, section 7199.

"If the defendant has been convicted of two or more offenses before judgment on either, the judgment is that the imprisonment on one commence at the expiration of the imprisonment upon any other of the offenses." Shannon's Code, section 7201.

"Whenever a felon is convicted of stealing or feloniously taking or receiving [stolen] property, or defrauding another thereof, the jury shall ascertain the

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value of such property, if not previously restored to the owner, and the court shall, thereupon, order the restitution of the property, and in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases." Shannon's Code, section 7208.

"The court may also, when any person is convicted of a capital offense, and the jury who convicted him state in their verdict that they are of opinion that there are mitigating circumstances in the case, commute the punishment from death to imprisonment for life in the penitentiary." Shannon's Code, section 7232.

"A conviction, judgment and execution for any one offense is no bar to a prosecution for any other public offense, committed previously, not necessarily included in the offense for which defendant was convicted." Shannon's Code, section 7250.

Illustrations might be multiplied, but the Constitution of 1870 itself shows what its framers understood the word "conviction" to mean. It is provided in the Constitution:

"That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by a court of competent jurisdiction." Article 1, section 5.

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Without further elaboration we are satisfied that as used in article 3, section 6, of the Constitution the word "conviction" does not imply judgment or sentence. A pardon granted after a verdict of guilty is "after conviction," is valid, and entitles a defendant to his discharge, irrespective of judgment. An appeal in error suspends the judgment, but does not affect the verdict, and the defendant stands convicted, unless this court finds error and awards a new trial and venire *de novo*.

It is said, however, by the attorney-general that Barnes failed to plead his pardon on his former appeal to this court, and in no way called the attention of the court thereto, and that he has accordingly waived the benefit thereof.

It is undoubtedly true that the court does not judicially notice a pardon. A pardon is an act of grace, the benefit of which may be accepted or rejected by the convict. It is said to be like a deed, in that delivery is essential, and delivery is not complete without acceptance. If rejected, the court is without power to force the acceptance of executive clemency, and the court can neither know of the grant of a pardon nor presume its acceptance unless the facts are brought before it by motion, plea, or otherwise. So usually if one in possession of a pardon fails to plead it, and puts himself upon his trial, he has waived the advantage of such pardon. *United States v. Wilson*, 7 Pet., 150, 8 L. Ed., 640; *People v. Marsh*, 125 Mich., 410, 84 N. W., 472, 51 L. R. A., 461, 84 Am. St. Rep., 584; 4 Black. Com., 402.

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Barnes, however, did not willingly go to trial in this court on the appeal in error from judgment against him. He undertook to dismiss his appeal, but permission to do this was denied him as heretofore stated. There was no investigation and no trial of his case here on its merits, and could not have been, for there was no bill of exceptions. A slight modification was made in the judgment below, technical in character, upon motion of the attorney-general, and the said judgment affirmed for want of bill of exceptions.

While it would have been proper practice for pardon to have been pleaded here, still the circumstances were unusual, and without precedent in our books, and we are not inclined to hold that Barnes lost the benefit of his pardon by his failure to call it to the attention of this court. He manifested no disposition to experiment with the court or trifle with its jurisdiction, but endeavored to dismiss his appeal. He did not put himself on trial here. There was only a formal affirmance of the judgment against him. He did promptly exhibit and interpose his pardon, in the court below, when the case was remanded for execution of sentence. Such delay, under such circumstances, should be attributed rather to the novelty of the situation and lack of announced rules of practice in this jurisdiction rather than to motives that would hazard the efficacy of the pardon.

The pardon did not release Barnes from any of the costs in the criminal case. *Spellings v. State*, 99 Tenn.

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201, 41 S. W., 444; *Smith v. State*, 74 Tenn., (6 Lea), 637.

This case will be remanded to the court below, where petitioner will be held to secure all the costs in the criminal case. Upon payment of such costs he will be discharged. The costs of the *habeas corpus* proceedings are taxed to Pickett county. *Henderson v. Walker*, 101 Tenn., 229, 47 S. W., 430.

GEORGE VAN TUYL JR., *et al.* v. JOHN CARPENTER *et al.*

(Nashville. December Term, 1915.)

1. BANKS AND BANKING. Rights of stockholders. Representation.

Under the New York statute, authorizing the superintendent of banks to ascertain financial condition and make assessments on stockholders by arbitrary determination, and allowing the corporation ten days to apply for injunction, the doctrine of representation of stockholders by the corporation does not apply, nor does the failure of the corporation to apply for injunction estop the stockholders and make the assessment binding; and the assessment, being arbitrary, will not be enforced in Tennessee. (*Post*, pp. 635-638.)

Cases cited and approved: *Coe v. Armour Fertilizer Works*, 237 U. S., 413; *Hartford L. Ins. Co. v. Ibs*, 237 U. S., 662; *Supreme Council R. A. v. Green*, 237 U. S., 531.

2. CORPORATIONS. Right of stockholders. Representation. Powers. Statutes. Construction.

The power of representation by a corporation of its stockholders which may, by mere failure to exercise it, estop the stockholders to deny liability for an arbitrary assessment of the full value of their stock, ought to be conferred in unmistakable terms of the statute itself, and will not be conferred by construction. (*Post*, pp. 635-638.)

3. EVIDENCE. Rules of evidence. Operation. Comity.

No State can impose upon any other a rule of evidence for use in the courts of the latter. (*Post*, pp. 638, 639.)

4. CORPORATIONS. Stockholder's liability. Statutes. Retroactive effect.

A statutory amendment of another State, adopted after making of contract of subscription to corporation stock, and even after bill to enforce assessment on such stock, cannot apply to the

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case so brought or the contract involved therein, even under the rule of comity. (*Post*, pp. 638, 639.)

5. COURTS. Decisions controlling. Validity of Statute. Analogy with other acts.

The holding that New York laws as to arbitrary assessment by the banking superintendent on stockholders will not be enforced in Tennessee does not require a similar holding as to Acts 1913, chapter 20, which requires the banking superintendent to bring corporate affairs before the court of chancery. (*Post*, p. 639.)

Acts cited and construed: Acts 1913, ch. 20.

6. COURTS. Decisions controlling. Matters not contested.

While a decision that assessments by the comptroller of the currency are conclusive necessarily implies that they are valid, yet when that power is merely assumed without examination, the point cannot be successfully used by analogy in determining the validity of a statute authorizing assessments by the banking commissioner, where the question is directly raised. (*Post*, pp. 639-641.)

Cases cited and approved: *Kennedy v. Gibson*, 8 Wall., 498; *Casey v. Galli*, 94 U. S., 673; *United States ex rel. Citizens' Nat. Bank v. Knox*, 102 U. S., 422; *Bushnell v. Leland*, 164 U. S., 684; *Studebaker v. Perry*, 184 U. S., 258;

7. BANKS AND BANKING. Stockholders' liability. Validity of statutes. Determination. Statutes of other States.

In suit in Tennessee to collect arbitrary assessments on stock by the New York banking commission, the question is not whether the statute authorizing such assessments is valid, but whether public policy of Tennessee permits such power to vest in a ministerial officer. (*Post*, p. 641.)

Case cited and approved: *Matter of Union Bank*, 204 N. Y., 513.

8. BANKS AND BANKING. Insolvency receivers. Actions.

The right of the New York banking commissioner to recover assessments under New York law in Tennessee depends on the statute, and unless the right to sue in foreign State is given by statute, he cannot sue in such State. (*Post*, pp. 641, 642.)

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Cases cited and approved: *Hale v. Allinson*, 188 U. S., 65; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S., 561; *Bernheimer v. Converse*, 206 U. S., 534; *Converse v. Minn. Thresher Mfg. Co.*, 212 U. S., 567; *Converse v. Hamilton*, 224 U. S., 243; *Selig v. Hamilton*, 234 U. S., 652; *Irvine v. Elliott (D.C.)*, 203 Fed., 82; *Carnegie Trust Co. v. Crockett*, 188 S. W., —.

9. RECEIVERS. Jurisdiction. Action by receiver. Foreign States.

The rule is general that a mere chancery receiver cannot sue in a foreign State, and can assert claims only through exercise of comity by the State in which he seeks to exercise his functions, and the rule necessarily attributes the duties of a receiver to an officer of a foreign State claiming authority under its legislative act, since foreign laws can have no extraterritorial efficacy, save in those instances which are governed by the "full faith and credit" clause of the federal Constitution. (*Post*, p. 642.)

Cases cited and approved: *Hardee v. Wilson*, 129 Tenn., 511; *Booth v. Clark*, 17 How., 322; *Great Western M. & M. Co. v. Harris*, 198 U. S., 561; *Converse v. Hamilton*, 224 U. S., 243.

10. RECEIVERS. Insolvency receivers. Jurisdiction of actions.

If the receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State. (*Post*, p. 643.)

Cases cited and approved: *La Fayette Trust Co. v. Higginbotham*, 136 App. Div., 747; *Matter of Union Bank of Brooklyn*, 204 N. Y., 313; *State v. Del Rio Turnpike Co.*, 131; Tenn., 600.

11. BANKS AND BANKING. Insolvency receivers. Actions.

Until judicial determination of amounts needed for liquidation of the corporation, the superintendent of banks, or statutory receiver, though having title to the assets and empowered to sue in a foreign State, cannot bring such suit. (*Post*, pp. 643, 644.)

12. CORPORATIONS. Rights of stockholders. Contracts.

The liability of a stockholder for assessments arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such a relation to it as that he is bound by its terms,

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and may be said to agree by implication that he will pay when the conditions of his liability for a specific amount are lawfully made to appear. (*Post*, pp. 644, 645.)

Cases cited and approved: *Whitman v. Oxford Nat. Bank*, 176 U. S., 559; *Ferguson v. Sherman*, 116 Cal. 169; *Flash v. Conn.*, 16 Fla., 428; *Bell v. Farwell*, 176 Ill., 489; *Stocker v. Davidson*, 74 Kans., 214; *Pfaff v. Gruen*, 92 Mo. App., 560; *Hancock Nat. Bank v. Ellis*, 172 Mass., 39; *Christopher v. Norvell*, 201 U. S., 216; *Kulp v. Fleming*, 65 Ohio St., 321.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson county.—JOHN ALLISON, Chancellor.

KEEBLE & SEAY and A. W. STOCKWELL, JR., for appellants.

VERTREES & VERTREES, PITTS & McCONNICO, E. A. PRICE, C. C. TRABUE, THOS. J. TYNE, and STOKES & STOKES, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the court.

The bill in the present case was filed in the chancery court of Davidson county, against Carpenter and others, stockholders of the Carnegie Trust Company, a New York banking concern, to recover on a stock assessment made by the complainant Van Tuyl, as superintendent of banks of the State of New York. There

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was a demurrer, which was sustained by the chancellor, and the complainants appealed to this court, and have assigned errors.

The bill alleges, in substance, that at the time defendants became stockholders there was a statute in New York which made stockholders liable for the debts of the corporation to the full face value, or amount, of their stock; that is, a double liability, the duty of paying in the first instance not only the full stock subscriptions, but in addition thereto an equal amount, if needed to pay the debts of the concern; that under the statute it was the duty of the complainant, as superintendent of banks to seize any bank in the State which he might believe to be in an unsafe condition, from misconduct of its officers, impairment of capital, or on numerous other grounds stated, and to administer its assets, pay its debts, and return the residue, if any, to such bank or its stockholders; that it was a part of his duty to assess the amount to be paid by stockholders, on the reserved liability mentioned, in the way of such percentage thereof, as he should deem necessary or even to the whole sum; that the Carnegie Trust Company, by reason of its conduct, became amenable to the operation of the statute, and under the authority of the statute, he took charge of it, and proceeded to administer its affairs; that on an examination of its assets and liabilities he found that the latter far exceeded the former, so that the corporation was insolvent; that he thereupon proceeded to assess the stockholders to the full amount of the reserved liability; that after

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making this assessment, he notified the stockholders by mail, according to the statute, of the amount so assessed by him against each one, and demanded payment of them, but that the Tennessee stockholders now sued had failed to pay. Hence this action was brought against them.

It does not appear that the agency of any court in the State of New York was invoked to ascertain the fact of insolvency, and the necessity of assessing the stockholders, or that the statute contemplated or authorized such resort to court proceedings, all authority in the premises being conferred upon the superintendent, the only access to any court being a right accorded to the corporation assailed, within ten days after its seizure to apply for an injunction; this application to be heard by the court referred to, on pleadings and evidence offered, and an injunction to be granted restraining the superintendent from further interference, if the evidence offered should sustain the application, otherwise the application to be dismissed.

The act authorized the superintendent to sue the debtors of the bank, also provided for certain court action in the sale of noncollectible assets, and in the declaration of dividends.

This was the substance of the statute so far as necessary to be stated, at the time the original bill was filed in January, 1914. Later, an amended and supplemental bill was filed, bringing forward a New York statute passed after the filing of the original bill, giving the superintendent power to sue stockholders

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either jointly or severally. So much of this new act as we deem necessary to further specially refer to is set out *infra* in the body of this opinion in its logical relation to the questions discussed.

It appears from the bill that the shares subscribed were 15,000, and of those the defendants, aggregated, represent something over 2,000.

There were ten grounds of demurrer filed, but we deem it necessary to refer to only one of them. This raises the point that the statute is arbitrary and oppressive, and should not be recognized here under principles of comity.

The New York statute under which the suit is brought authorizes the superintendent of banks to examine the bank, determine its assets, ascertain its indebtedness, and make the assessment on stockholders, without the aid of any court. In such a proceeding, and under such a power, the rights of stockholders are foreclosed without a hearing, and without their presence, either in person or by representation. The authorities hold that the corporation itself represents its stockholders in a proceeding brought in equity for its liquidation, in so far as concerns the ascertainment of the amount of assets, and debts, and the necessity of a call, leaving open to such alleged stockholder the question whether he was in fact a stockholder, and the amount of his stock, and cross-claims or credits against the corporation. *Coe v. Armour Fertilizer Works*, 237 U. S., 413, 423, 35 Sup. Ct., 625, and cases cited (59 L. Ed., 1031), and see on the general principle; *Hartford*

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L. Ins. Co. v. Ibs, 237 U. S., 662, 35 Sup. Ct., 692, 59 L. Ed., 1165, L. R. A., 1916A, 765; *Supreme Council R. A. v. Green*, 237 U. S., 531, 35 Sup. Ct., 724, 59 L. Ed., 1089, L. R. A., 1916A, 771. But no such representation is supported by the authorities where the call is made by a mere nonjudicial officer belonging to the executive department of a State government. Nor do we think any such decision can be properly made, since the power exercised is purely arbitrary. Furthermore, we do not think that the arbitrary character of the proceeding is countervailed by the leave which the statute gives to the corporation to go into a court within ten days after its seizure by the superintendent, and apply for an injunction. No such privilege is accorded to the stockholders as such, or to any stockholder, so that it results, if the board of directors does not choose to apply to the court or in default thereof the majority of the stockholders, through or pursuant to a stockholders' meeting, within the ten days referred to, there is no possibility of relief for any stockholder against arbitrary action on the part of the superintendent of banks. Let it be conceded that if the directors should make such application or if the corporation should be brought into action through a meeting of the stockholders, the whole body and each of the stockholders would be represented by the corporation. It remains that in the present case it does not appear that any such proceedings were instituted by the corporation, and therefore it does not appear that there was any representation. So that, to

sustain the power exercised by the superintendent of banks, and to give effect to it against stockholders in Tennessee, we must be willing to adjudge, either that the power to represent is tantamount to actual representation, or that the possession of such power and the failure to exercise it would be binding by way of estoppel on the stockholders. The first supposition is, of course, absurd. The second is also unsound, because it is based on the presumption of an active duty resting on the corporation to apply for an injunction in every such case, or to consider the question and decide whether such application should be made. It is clear that the statute imposes no such active duty, but at most gives the corporation the privilege of making the application. In deciding whether it will avail itself of the privilege, the corporation does not represent the individual stockholders as to the reserved liability due creditors from them, under the statute. The statute does not in terms give it such power, and we cannot, by construction, hold that it was conferred. Beyond doubt a power of representation so far-reaching ought to be conferred in unmistakable terms in the statute itself, so that subscribers to stock would know, when entering into the contract, the terms to which they were consenting. So it remains, as we think, that no means of relief are afforded stockholders against arbitrary action on the part of the superintendent, unless it be found in the amendment of the year 1914; which provides that in any action based on the assessment made by the superintendent—

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“the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation, and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated.”

No State can impose upon any other State a rule of evidence for use in the courts of the latter. But if it be assumed that the contract between the parties might be such as to make it the duty of the court of the foreign State to adopt the rule in the particular case by way of estoppel on the parties to deny its force, there is nothing in the present contract to justify such course, since the amendment was adopted long after the contract of subscription was entered into, and indeed after the original bill in the present case was filed. So, the statutory rule quoted could be applied here only through comity. Should comity, a favor, be extended here, in support of the arbitrary non-judicial action of the superintendent of banks of the State of New York, which would cast upon our own citizens the burden of either going to New York in person, or by agents, and at great expenditure of time and money investigating all of the assets and liabilities of a great banking institution in that State? The unreasonableness of such a course is manifest on its mere statement. Cases may be easily imagined where the initial expense of such an investigation would be much

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more than the liability sought to be enforced. In such instances the mere demand by suit would be equivalent to a compulsion to pay, and so the party would be deprived of his day in court. If the rule could so operate in any case it ought not to be enforced in this jurisdiction at all. So the question recurs: Shall we enforce a liability based solely on the arbitrary action of the superintendent of banks of the State of New York? We decline to do so. That action is arbitrary because it is based solely on the will of a single person, directed by no fixed principle declared in any form by the social organization.

It is urged that if we so hold, we must adjudge our own banking law void. The contention is unsound. Our superintendent of banks can indeed close the doors of a bank, but he must at once bring the affairs of the bank before the court of chancery, and act under its orders. Acts 1913, chapter 20.

For an apt analogy we are referred to the power of the Comptroller of the Currency to fix the amount which the stockholders of suspended national banks shall pay, which assessments it has been held cannot be controverted. *Kennedy v. Gibson*, 8 Wall., 498, 19 L. Ed., 476; *Casey v. Galli*, 94 U. S., 673, 24 L. Ed., 168; *United States ex rel Citizens' Natl. Bk. v. Knox*, 102 U. S., 422, 26 L. Ed., 216; *Bushnell v. Leland*, 164 U. S., 684, 17 Sup. Ct., 209, 41 L. Ed., 598; *Studebaker v. Perry*, 184 U. S., 258, 22 Sup. Ct., 463, 46 L. Ed., 528. No case has been cited, and we are not aware of any, in which a question similar to the one we have before us

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has ever been discussed in respect of the National Banking Acts and the powers of the Comptroller of the Currency thereunder. While the decision that the assessments are conclusive necessarily implies that the power conferred is valid, yet when that power is merely assumed, without examination, the point cannot be successfully used in determining the validity of another statute where the question is directly raised. It is true that in *Bushnell v. Leland*, supra, the constitutional question was raised, and stated directly in the opinion, but discussion of it was pretermitted on the ground that it had been settled in *Casey v. Galli*, supra, and *U. S. ex rel. v. Knox*, supra. It is stated that the question was made on the brief of counsel in *Casey v. Galli*; and so it was, but we are unable to find in the opinion of the court in that case any reference to the point! nor is there such allusion to the question in the opinion in *U. S. ex rel. v. Knox*. So it comes to this: That in *Kennedy v. Gibson*, and *Casey v. Galli* the constitutionality of the vestiture of such power in the Comptroller of the Currency was taken for granted, or silently assumed, and subsequent cases by reference to these treated the question as closed, and further consideration of it, without doubt on the highest grounds of public policy, was refused. It is no doubt true that if such an assessment should be sued on in a State court, it would be enforced regardless of the views of that court on the abstract question, since the laws of the United States are also binding on the States so far as applicable, and the question of comity could not

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arise. So the analogy is not useful, and we need not pursue the question further.

But we should add in this connection that the question is not whether the New York act is valid. That is an inquiry for the New York courts, under the Constitution of that State, and we do not express an opinion on it. We do say, however, that it is against the policy of this State to vest such powers in a mere ministerial officer, powers which we regard as of a highly judicial nature, to be exercised only by courts after due notice and the appearance of parties in person or by representation. Indeed the principle as we state it seems to be recognized by the supreme court of the United States in those cases which we have cited, holding assessments made in foreign courts valid on the ground that, the corporation being sued and present, the stockholders were present by its virtual representation. *Coe v. Armour Fertilizer Works*, supra, and cases which we have cited with it. We may add that in *Matter of Union Bank*, 204 N. Y., 313, 97 N. E., 737, the superintendent of banks is classed as a mere receiver, and it is denied that he has any judicial powers.

However, if we were at liberty to disregard the reasons already stated, there is another ground conclusive against the complainants. The right of action, if any, is not in the bank, but in the superintendent of banks. His right is rooted in the statute, but that statute gives him no right to sue in a foreign State. Such vestiture has been held, by the highest authority, an essential prerequisite. *Hale v. Allinson*, 188 U. S., 65, 23

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Sup. Ct., 244, 47 L. Ed., 388; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S., 561, 25 Sup. Ct., 770, 49 L. Ed., 1163; *Bernheimer v. Converse*, 206 U. S., 534, 27 Sup. Ct., 755, 51 L. Ed., 1176; *Converse v. Minn. Tresher Mfg. Co.*, 212 U. S., 567, 29 Sup. Ct., 691, 53 L. Ed., 654; *Converse v. Hamilton*, 224 U. S., 243, 32 Sup. Ct., 415, 56 L. Ed., 749, Ann. Cas., 1913D, 1292; *Selig v. Hamilton*, 234 U. S., 652, 34 Sup. Ct., 926, 58 Ed., 1518. And see *Irvine v. Elliott* (D. C.), 203 Fed., 82. The principle was recognized by this court *arguendo*, in the case of *Carnegie Trust Co. v. Crockett*, 188, S. W.,—, June 26, 1914, at Nashville.

The rule is general that a mere chancery receiver has no right to sue in a foreign State, and can assert such claims as he has only through the exercise of comity on the part of the State in which he seeks to exercise his functions. *Hardee v. Wilson*, 129 Tenn., 511, 167 S. W., 475, Ann. Cas., 1916A, 94; *Booth v. Clark*, 17 How., 322, 15 L. Ed. 164; *Great Western M. & M. Co. v. Harris*, 198 U. S., 561, 25 Sup. Ct., 770, 49 L. Ed., 1163; *Converse v. Hamilton*, 224 U. S., 243, 32 Sup. Ct., 415, 56 L. Ed., 749, and the same rule would necessarily attribute the duties of a receiver to an officer of a foreign State claiming authority under a legislative act of such foreign State, since foreign laws can have no extraterritorial efficacy, save in those instances which are governed by the "full faith and credit" clause of our federal Constitution, and the case supposed is not one of them.

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However, if the receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State (*Hardee v. Wilson*, supra), but the New York cases hold that the superintendent of banks does not possess the legal title to such assets as are here sued on, but only the right to sue and collect. *La Fayette Trust Co. v. Higginbotham*, 136 App. Div., 747, 121 N. Y. Supp., 490; *Matter of Union Bank of Brooklyn*, 204 N. Y., 313, 97 N. E., 737.

It is true that notwithstanding the absence of the legal title in the receiver, or the absence of authority given him by statute to sue in this State, we might extend the permission, as already indicated, by comity, but for the reasons previously stated, we think this should not be done. Indeed we have recently declared nonenforceable one of our own statutes which authorized a board of turnpike superintendents, without previous judicial action, to throw open the gates of a turnpike because the condition of the road was, on inspection of the superintendents, found by them, according to their conception of the matter, not up to certain statutory requirements. *State v. Del Rio Turnpike Co.*, 131 Tenn., 600, 175 S. W., 1143.

We may add that even if it appeared that the foreign superintendent of banks, or statutory receiver, had either the title to the assets, or power given him by the statute of his State, to sue in a foreign jurisdiction, or both, we do not see how he could, in a foreign jurisdiction, sue stockholders on their double liability, without a previous judicial ascertainment, in

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his own State, in a suit brought against the corporation, showing debts and assets and the necessity of a call on stockholders. The possession of title would be of no importance unless the amount due could be ascertained. Likewise the right to sue in a foreign State could have no extraterritorial effect, save as an incident to a judicial proceeding in the receiver's own State, purporting to confer that right under statutory authority; it would then be operative, if at all, under the full faith and credit clause of the federal Constitution.

In writing this opinion we have assumed, as the clear weight of authority indicates, that stockholders who subscribe for stock in a corporation, in a State which at the time has a statute providing for the double liability referred to, become contractually bound to meet and carry the liability imposed by the statute; that the duty imposed is governed by the law of contract, and the payment required cannot be treated as a penalty. The question is much discussed in the briefs but we deem it necessary to say nothing further on the subject than has been said. *Whitman v. Oxford Nat. Bank*, 176 U. S., 559, 20 Sup. Ct., 477, 44 L. Ed., 587; *Ferguson v. Sherman*, 116 Cal., 169, 47 Pac., 1023, 37 L. R. A., 622; *Flash v. Conn.*, 16 Fla., 428, 26 Am. Rep., 721; *Bell v. Farwell*, 176 Ill., 489, 52 N. E., 346, 42 L. R. A., 808, 68 Am. St. Rep., 194; *Stocker v. Davidson*, 74 Kan., 214, 86 Pac., 136, 118 Am. St. Rep., 315; *Pfaff v. Gruen*, 92 Mo. App., 560, 69 S. W., 405; *Hancock Nat. Bank v. Ellis*, 172 Mass., 39, 51 N. E., 207, 42 L. R. A.,

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396, 70 Am. St. Rep., 232. Perhaps a better statement of the principle would be that the liability arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such a relation to it, as that he is bound by its terms, and so may be said to agree by implication that he will pay when the conditions of his liability for a specified amount are lawfully made to appear. *Christopher v. Norvell*, 201 U. S., 216, 224, *et seq.*, 26 Sup. Ct., 502, 50 L. Ed., 732, 5 Ann Cas., 740; *Kulp v. Fleming*, 65 Ohio St., 321 62 N. E., 334, 87 Am. St. Rep., 611. But if the method of ascertaining such liability is such as cannot be recognized in a foreign State because against its public policy, then such liability cannot be consistently recognized in that State. Therefore, on the grounds we have stated, such liability cannot be enforced here merely on an assessment made by the superintendent of banks of the State of New York; and the judgment dismissing the bill must be affirmed.

FANCHER, Special Judge, sitting in the place of LANDEN, J.

Silliman v. Life Ins. Co.

SILLIMAN v. INTERNATIONAL LIFE INS. CO.

(Nashville. December Term, 1915.)

1. INSURANCE. Life policies. Statutes. Construction. Not in good faith.

In acts 1901, Chapter 141, section 1, as to penalties for refusing to pay a policy, the words "not in good faith," are antithetical to "in good faith," and imply a lack of good or moral intent as the motive for refusal to pay the loss. (*Post*, pp. 647, 648.)

Acts cited and construed: Acts 1901, ch. 141, sec. 1.

2. INSURANCE. Life policies. Refusal to pay loss. Right to statutory penalty.

Under such statute, the right to recover the penalty is conditional, and does not exist where the right to recover the face of the policy has been forfeited by failure to pay premiums, or where the refusal is in good faith. (*Post*, pp. 648-650.)

Cases cited and approved: *Thompson v. Insurance Co.*, 116 Tenn., 557; *De Rossett Hat Co. v. London & Lancashire Ins. Co.*, 134 Tenn., 199.

Cases cited and distinguished: *Grain Co. v. Weaver*, 128 Tenn., 609; *Harowitz v. Fire Ins. Co.*, 129 Tenn., 691; *Ins. Co. v. Kirkpatrick*, 129 Tenn., 55.

3. INSURANCE. Life policies. Refusal to pay loss. Right to statutory penalty. Evidence.

Evidence held insufficient to show that insurer's refusal to pay loss on life policy was not in good faith. (*Post*, pp. 650-652.)

Case cited and approved: *Silliman v. Ins. Co.*, 151 Tenn., 303.

4. COMPROMISE AND SETTLEMENT. Validity.

The law encourages honest efforts to compromise differences. (*Post*, pp. 650-652.)

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5. INSURANCE. Life policies. Refusal to pay loss. Right to statutory penalty. Evidence.

In view of differences of opinion as to statutory construction and determinative facts, an insurer is not necessarily liable for refusal to pay a loss as made in bad faith, on the ground that its attorneys should have known the law fixing liability on the policy (*Post*, pp. 650-652.)

FROM GILES

Appeal from the Chancery Court of Giles County.
—WALTER S. BEARDEN, Chancellor.

E. E. ESLICK, for appellant.

CHILDERS & WOODWARD, for appellee.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

The case turns on the construction of the words "not in good faith" as used in the first section of chapter 141, Acts of 1901, page 248. The Insurance Company has appealed from a decree awarding against it a recovery for a certain sum as a penalty denounced by the act, and insists that under the evidence, which is free from material dispute, and under a correct construction of the Act, and particularly the words above quoted, that the decree is erroneous.

We think the point is well made. The words "not in good faith" are antithetical in meaning to the words "in good faith." The words "not in good faith" imply a

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lack of good or moral intent as the motive for the refusal to pay a loss. They describe the state of mind which underlies and causes the act of refusal to pay. It is the existence of this state of mind as the cause of the act, and the resulting damage to the victim of the act, which the statute penalizes, just as our laws, intended to punish and suppress crime, look, not to the act which damages society and perhaps destroys its victim, but to the intent or motive which caused the act and the resulting public and private damage.

It was not the purpose or intent of the legislation embodied in section 1 of the Act that refusal to pay a demand, made by a policy holder after occurrence of a loss and within sixty days after making the demand, should, at all events and without more, confer on the policy holder a right to the penalty. Such is by no means a true construction of the words employed. The right to recover is not an absolute one. It is conditional. There can be no recovery of the penalty where the right to recover the face of the policy has been forfeited by nonpayment of the premiums at their due date. *Thompson v. Insurance Co.*, 116 Tenn. (8 Cates), 557, 92 S. W. 1098, 6 L. R. A. (N. S.), 1039, 115 Am. St. Rep. 823.

In another of our cases the conditional character of the right to recover the penalty is pointed out, and it is said:

"The statute does not penalize insurance companies for defending suits brought against them, even though they should ultimately lose. They may defend in good

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faith, and we cannot say that the surety company did not act in good faith in interposing its defense in the case before us. Without doubt there was enough in the case to justify a contest, seeing the difficulty attendant upon the construction of the contract as a whole, including the rider, and also the deduction that must be made from the amount sued for, in view of the fact that the warehouse receipts were not wholly unsupported by grain in store." *Grain Co. v. Weaver*, 128 Tenn. (1 Thomp.), 609, 163 S. W., 814.

Constructing the statute in another case, we said:

"It authorizes the penalty referred to, provided that it shall be made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and provided, further, that the imposition of the liability shall be within the discretion of the court or jury trying the case, and be measured by the additional expense, loss, and injury thus entailed. We think the chancellor was well within his judicial discretion in refusing a decree for the penalty in this cause upon the ground that the evidence on behalf of the insured clearly discloses that when the firemen entered the building after the discovery of the fire, and extinguished the fire, they and other persons who visited the building later discovered evidence that, in some way not explained on the record, bolts of goods in the tailor shop, inclosed in glass cases, were dampened and smelled strongly of gasoline or coal oil, clearly justifying a suspicion that the fire was of dishonest origin. While this is true, the evidence would not sustain a defense based on that

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ground, and no such defense was made, yet we think there was sufficient ground for the denial of the penalty." *Harowitz v. Fire Ins. Co.*, 129 Tenn. (2 Thomp.), 691, 168 S. W., 163.

"What has been said suffices to show some of the conditions or limitations which have been held to exist under the wording of the statute in cases where the demand for payment was made at the proper time and payment was refused, although the right to recover the face of the policy existed, and was mature when the demand was made.

But under our cases another condition is imposed, and it is this:

"A formal demand must be made on the insurer for the payment of the amount due after the maturity of the policy is fixed according to its terms. . . . The formal demand not having been made, as required by the statute, there can be no recovery of the penalty." *Insurance Co. v. Kirkpatrick*, 129 Tenn. (2 Thomp.), 55, 16 S. W., 1186.

See, also, *De Rossett Hat Co. v. London & Lancashire Ins. Co.*, 134 Tenn. (7 Thomp.), 199, 183 S. W., 720.

The penalty sued on and for which decree went in the court below in these consolidated causes is based on a demand, the sufficiency of which is not questioned by the assignments of error. Demand was made for the face value of two policies issued by the company insuring the life of W. B. Silliman, and naming his wife, Mattie I. Silliman, as beneficiary. The company refused to pay, but insists that it did so in good faith.

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and that in response to the demand, it made a timely tender to the beneficiary of all that was due her under the policies, to wit, the sum of ninety dollars and forty cents under each of them. The ground of the denial of liability by the company was that W. B. Silliman committed suicide, and that, therefore, under the terms of each policy, the amount tendered was all that was due. Mrs. Silliman declined to accept the tender and brought suit on these policies. The company demurred to each bill. The chancellor overruled the demurrer and allowed an appeal. One of the cases came to this court on that appeal, and the decree of the chancellor was affirmed by us at our December term, 1914. The opinion in the case was reported in *Silliman v. Insurance Co.*, 131 Tenn. (4 Thomp.), 303, 174 S. W., 1131, L. R. A., 1915F, 707. Thereafter, in due time, the company tendered and paid into the registry of the chancery court the full amount of the face of each policy, and all interest and court costs; and by its answer denied liability for the penalty on the ground that it had refused to make payment and contested its liability for the principal sum of each policy in good faith, and was not liable for the penalty.

We are wholly unable to see any lack of good faith. The question of the liability of the company on the state of facts shown in *Silliman v. Insurance Co.*, supra, was open and undecided in this State. As we see this case, there is neither direct nor circumstantial evidence that the company in refusing to pay was not acting in good faith. It is urged that it attempted to compromise and

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settle the question of liability both before and after the death of Mr. Silliman, but we fail to see in this act any lack of good faith. Indeed, the law encourages honest efforts to compromise differences. But it is said the efforts were not honest. We have been unable to find the evidence which sustains this insistence.

It is urged that the company and its counsel should have known the law which fixed liability. It is, however, conceded that they might be excusable for failure to know a determinative fact. Our cases do not recognize such a distinction, and a consideration of the many legal questions on which the courts are in hopeless conflict suggests the thought that jurisprudence is not one of the exact sciences, and that one who holds out to have a practical knowledge of its principles may have quite an honest but most erroneous, view of a concrete legal question.

The proof under the statute does not make out a proper case for the recovery of the penalties, and the bills, in so far as they seek such recovery, are accordingly dismissed, and the complainant will pay the costs of the court below and of this court incident to her claim for the penalties.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1916.

STATE *ex rel.* THOMPSON, Atty-Gen., *v.* REICHMAN,
Sheriff.

* (*Jackson*. April Term, 1916.)

1. SHERIFFS AND CONSTABLES. Powers and duties.

The office of sheriff carries all the common-law powers and duties except as modified by statute. (*Post*, pp. 661, 662.)

Acts cited and construed: Acts 1915, ch. 11; Acts 1909, ch. 1; Acts 1913, ch. 2.

Case cited and approved: *State v. Crump*, 134 Tenn., 121.

2. SHERIFFS AND CONSTABLES. Powers and duties. "Notice."

Under Shannon's Code, section 6899, a sheriff who has "notice" of an offense and does not do his duty to prevent it is guilty of a misdemeanor, and any knowledge from any source is notice within the statute. (*Post*, pp. 662-666.)

Code cited and construed: Secs. 452, 6892-6895, 6898, 6899, 6900, 6978, 6997 (S).

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3. SHERIFFS AND CONSTABLES. Powers and duties. Notice.

Since cities have police officials, the sheriff may assume that they will perform their duties, but if he has knowledge of neglect on their part, or reason to think there is neglect, he must inform himself and prevent and suppress offenses in cities as well as rural districts. (*Post*, pp. 666, 667.)

4. ARREST. Arrest without warrant. "Breach of the peace." Unlawful sale of liquors.

"Breach of the peace" being a generic term including all violations of public peace or order, includes unlawful sale, actual or threatened, of intoxicating liquors, and the sheriff may arrest without warrant therefor. (*Post*, pp. 667-669.)

Acts cited and construed: Acts 1877, ch. 23.

Cases cited and approved: *Webster v. State*, 110 Tenn., 507, *State v. Frost*, 103 Tenn., 694.

Cases cited and distinguished: *Galvin v. State*, 46 Tenn., 294; *Smith v. Knoxville*, 40 Tenn., 247.

5. ARREST. Arrest without warrant. Threatened unlawful sale of intoxicating liquors.

While mere possession of intoxicating liquors in any quantity is not unlawful, it is a breach of the peace for one having liquors to prepare for sale thereof, that being a threat to violate the law against sales. (*Post*, pp. 669-673.)

Cases cited and distinguished: *Hayes v. Mitchell*, 69 Ala., 454; *Johnson v. Mayor*, 46 Ga., 80; *Boaz v. Tate*, 43 Ind., 60.

6. ARREST. Arrest without warrant. Threatened sale of liquors.

The right of the sheriff to arrest without warrant for threatened unlawful sale of intoxicating liquors and to close the place of business is not unlawful as an arbitrary invasion of property rights, which are not more sacred than the person, which may be seized to prevent breach of peace. (*Post*, pp. 673, 674.)

Case cited and approved: *Yerkes v. Smith*, 157 Mich., 559.

7. SHERIFFS AND CONSTABLES. Duties. Compensation.

The requirement that the sheriff, to prevent breaches of the peace, arrest one who threatens unlawful sale of intoxicating

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liquors and if necessary close his place of business, is not subject to the objection of requiring services without compensation. (*Post*, pp. 674, 675.)

8. ARREST. Arrest without warrant. Threatened unlawful sale of intoxicating liquors.

For a misdemeanor committed without his presence, a sheriff cannot arrest without warrant; but, if breach of peace is threatened in his presence, he needs no warrant to arrest to prevent the breach under Shannon's Code, section 6892. (*Post*, pp. 675, 676.)

Code cited and construed: Sec. 6892 (S.)

9. SHERIFFS AND CONSTABLES. Duties of sheriff. Investigations.

The duty of the sheriff, having notice of commission of an offense being to prevent or suppress it, involves the duty to at least make some investigation, and it is not necessary in case of unlawful sales of intoxicating liquors, for the sheriff to actually see sales before swearing out warrants. (*Post*, pp. 676, 677.)

Case cited and approved: *State v. Good*, 77 Tenn., 240.

10. SHERIFFS AND CONSTABLES. Duties of sheriff. Investigations.

Although the sheriff is not bound to maintain a detective force, and no statute in terms make it his duty to swear out warrants or give information to the grand jury, yet being commanded to prevent and suppress crimes and breaches of the peace, he must use all the means provided by law to accomplish such end. (*Post*, p. 677.)

11 SHERIFFS AND CONSTABLES. Powers and duties. Breach. Evidence.

Evidence held to show that a sheriff failed to perform his duties to prevent and suppress breaches of the peace by unlawful sale and threatened unlawful sale of intoxicating liquors. (*Post*, pp. 678-680.)

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12. SHERIFFS AND CONSTABLES. Breach of duties. Defenses.

It is no defense for the sheriff's failure to prevent breaches of the peace by unlawful sales of intoxicating liquors, that the State was proceeding against offenders under the Nuisance Act (Laws 1913 [2d Ex. Sess.] chapter 2), or that the criminal court administration was lax and nothing would have been accomplished in case of arrest. (*Post*, pp. 680-684.)

Cases cited and approved: Commonwealth v. Wright, 158 Mass., 149; Pinkerton v. Verberg, 78 Mich., 573; Jamison v. Gaernett, 10 Bush. (Ky.), 221; Robinson v. Miner, 68 Mich., 549. .

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

G. T. FITZHUGH and F. M. THOMPSON, Attorney-General, for appellant.

CHAS. M. BRYAN and T. K. RIDDICK, for appellee. .

MR. W. L. FRIERSON, Special Justice, delivered the opinion of the Court.

This is a petition filed by the attorney-general of the State in the chancery court of Shelby county to remove the defendant from the office of sheriff of that county under the provisions of chapter 11, Acts 1915, entitled "An act to provide for the removal of unfaithful public officers, and providing a procedure therefor."

The petition contained many charges. Some of them, however, were considered by the chancellor insufficient,

Note.—See following opinion on petition to rehear.

even if true, to warrant a removal and were stricken out. There was then a very full hearing on the remaining charges with the result that the chancellor held that no misconduct or neglect of duty sufficient to justify a removal was shown and dismissed the petition.

The charge of the petition which has been the subject of the chief controversy, relates to the laws against the sale of intoxicating liquors. It is stated in great detail. But the substance of it is that, during his term as sheriff, defendant has not only failed and neglected to enforce these laws, but, through an agreement or understanding with the officials of the city of Memphis, has permitted saloons to be run in violation of law.

Both parties introduced a great mass of evidence touching this charge. From a consideration of this evidence, we think the following facts are established with but little conflict between the witnesses. Since the passage of the Act of 1909 extending the four-mile law (Laws 1909, chapter 1), which made the sale of intoxicating liquors in Memphis unlawful, the handling of the liquor question in that city has assumed a new phase with each new act passed by the legislature to secure the enforcement of the law. From 1909 to March 1, 1914, the law seems to have been entirely ignored. The saloons seem to have been recognized, and, in a measure regulated by the city officials. During this period, for a part of the years 1910 and 1911, the defendant was police commissioner of the city of Memphis. He knew the conditions, but made no ef-

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fort to enforce the liquor laws. On the contrary, as he admits, he recognized the existence of saloons and assumed to regulate them by requiring that they close each night at midnight, and remain closed all day Sunday. This condition continued and the saloons seem not to have been disturbed from any source until March 1, 1914, when what is known as the "Nuisance Act" went into effect (Laws 1913 [2d Ex. Sess.] chapter 2). Then began a period during which the only effort to enforce the law was through injunction bills filed by the district attorney-general or special counsel employed by the governor. The city authorities still did nothing. But several hundred injunction bills were filed and a great many places closed and a large number of dealers were sent to the work-house for violating the injunctions. Just what the conditions were during this period is the subject of some controversy, but we think it fairly appears that intoxicating liquors continued to be sold in many places in the city in varying degrees of openness. There was undoubtedly some effort at secrecy and concealment to guard against surprise by the special counsel in charge of the injunction suits and the officer working under him. But no danger seems to have been apprehended from any other source. Some places maintained bars; others did not. In many places liquors were served in the rear of barber shops, restaurants, and small grocery stores. In some, lunch counters were used as blinds, and, in others, sales were made behind interstate shipping house signs. The main difference, perhaps, was

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that stocks of liquors were not kept conspicuously displayed, but were kept more or less concealed, or where they could be quickly removed.

These were the conditions in the city when in August, 1914, defendant was elected sheriff, and on September 1, 1914, when he assumed the duties of that office. They remained unchanged until about February 1, 1915. During that time he did nothing toward enforcing the liquor laws in the city of Memphis except to serve the process from the chancery courts in some three hundred injunction cases. There were, however, a number of roadhouses and other places outside of the city where liquors were being sold. These he seems to have endeavored to break up. He was advised by his counsel that he had no right to make searches or to arrest, without a warrant, for a misdemeanor, unless committed in his presence. But notwithstanding this, he had his deputies make a number of raids, arrest a good many people, and destroy a considerable quantity of liquor. He also, through his deputies, secured the indictment of a considerable number of persons for selling liquors outside of the city.

But, on January 29, 1915, the act for the removal of unfaithful officers, known as the "Ouster Law," went into effect. Immediately the defendant and the city officials held a conference. The mayor made a public announcement that the liquor laws would be enforced in Memphis. Defendant announced that, co-operating with the city officials, he would enforce the law in the county. And, for a short time, there seems to have

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been a very fair enforcement of the liquor laws in Memphis. But, soon after the passage of the ouster bill, the policy of enforcing the law through injunction suits was abandoned and nothing further was done in that line except to wind up the suits already commenced.

Then, about May 1, 1915, the city officials adopted a new policy. Through the police, lists were made of all the places in the city in which it was known that liquor was being sold. Each dealer was arrested, but if he would turn over to the arresting officer "a forfeit" of \$50, he was left undisturbed in his place. If he did not appear at the city court, his \$50 was forfeited to the city, and this ended the matter. If he appeared he was fined \$50. In neither event was he bound over to the grand jury. Defendant admits that he knew of this practice. Some effort is made to deny that it was understood that the periodical payment of this \$50 would enable the dealer to continue his unlawful business without molestation. But it had this effect and we cannot doubt, from the record, that it was so intended and understood. Under this plan Memphis again had fairly open saloons. In places there was still some secrecy. Some places were being run in violation of injunctions, and precautions had to be taken. Others were selling on the sly and trying to avoid paying an occasional "forfeit" of \$50 to the city. But there were a great many open saloons.

These were the conditions prevailing during defendant's term of office and at the time the petition in this

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cause was filed. For misconduct and neglect of duty in permitting them to exist, the mayor and other city officials have been removed. *State v. Crump*, 134 Tenn. 121, 183 S. W., 505. The question now is whether they also furnish ground for removing defendant from the office of sheriff. If he was responsible for them or if they were due to his neglect of any duty which the law imposed on him, he is unworthy and must be removed. But if he has neglected no duty, if the law did not require him to do the things it is insisted he did not do, and we should remove him because of the conditions we have described, we would do judicial violence to the law—the worst kind of lawlessness.

For the State, it is insisted that it was his duty to suppress these lawless saloons, arrest the offenders and report them to the grand jury. For the defendant, it is insisted that he was under no duty to do detective service to discover violations of the law; that he had no authority to arrest for misdemeanors, without a warrant, unless the offense was committed in his presence; that it was not only not his duty, but would be unlawful for him to swear out a warrant on information; that no sales of liquor were made in his presence; and that, therefore, he neglected no duty which the law imposed on him when he failed to put an end to the conditions of which complaint is made.

To determine this issue, it is necessary to understand just what the duties of a sheriff are. The office of sheriff is a most ancient one. It carries with it, in America, all of its common-law duties and powers ex-

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cept as modified by statute. We have several statutes which bear on the question and which, taken together, set out the duties of the sheriff very much as they existed at common law.

Aside from the ordinary duties to execute and return process, to attend upon the courts, and to take charge of the jail, the following statutes, as set out in Shannon's Code, are applicable:

Sec. 452. "The sheriff and his deputies are conservators of the peace, and, to keep the peace, prevent crime, arrest any person lawfully, or to execute process of law, may call any person or summon the body of the county to their aid."

Sec. 6892. "Public offenses may be prevented by the intervention of the officers of justice (1) by requiring security to keep the peace; and (2) by suppressing riots, unlawful assemblies, and breaches of the peace."

Sec. 6893. "Whenever the officers of justice are authorized to act in the prevention of public offenses, other persons who, by their command, act in their aid, are justified in so doing.

Sec. 6894. "The sheriff is the principal conservator of the peace in his county, and it is his duty to suppress all affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace, to do which, he may summon to his aid as many of the male inhabitants of the county as he thinks proper."

Sec. 6895. "The judicial and ministerial officers of justice in the State, and the mayor, aldermen, marshals, and police of cities and towns, are also conser-

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vators of the peace, and required to aid in the prevention and suppression of public offenses, and for this purpose may act with all the power of the sheriff."

Sec. 6898. "If any person commanded to aid, under the provisions of this chapter, any magistrate or officer, without good cause, refuses or neglects to obey such command, he is guilty of a misdemeanor."

Sec. 6899. "If a magistrate or officer, having notice of any unlawful act provided against in this chapter, neglects or refuses to do his duty in the prevention of the public offense, he is guilty of a misdemeanor."

When an offense has been committed, a warrant for the arrest of the offender may be issued by a justice of the peace, upon information, after he has examined the informant on oath and is satisfied that the offense has been committed. Shannon's Code, section 6978.

The cases in which, to prevent a breach of the peace, the sheriff may, without a warrant, arrest a person for the purpose of requiring him to give security to keep the peace are set out in section 6900 of Shannon's Code as follows:

"It is the duty of all peace officers who know or have reason to suspect any person of being armed with the intention of committing a riot or affray, or of assaulting, wounding or killing another person, or of otherwise breaking the peace, to arrest such person forthwith, and take him before some justice of the peace."

The succeeding section provides how the justice of the peace shall require bond of the offender and, in default thereof, commit him to jail.

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With respect to the arrest, without a warrant, of persons accused of felonies, an officer is given a rather wide latitude, but beyond this and the section just quoted, the only provision for such arrests is:

“An officer may without a warrant, arrest a person: (1) For a public offense committed or a breach of the peace threatened in his presence.” Shannon’s Code, section 6997.

[To summarize, it is the duty of a sheriff to keep the peace and prevent or suppress crimes and public offenses. In order to do this, he is authorized to arrest, without a warrant, persons known to be or suspected of being armed for the purpose of committing a breach of the peace, and such persons may be required to give security to keep the peace. All other breaches of the peace he is simply commanded to suppress. And, to this end, he is authorized, for such a breach of the peace threatened in his presence, to make an arrest without a warrant. He may likewise arrest for any misdemeanor committed in his presence. In the case of all other misdemeanors, he must have a warrant.]

Now what kind of an officer does this make of a sheriff? We cannot agree that he is a mere process server, or that he may, if he would discharge the duties of his office, be passive until some one swears out a warrant for him to serve. Nor can he, if he knows in any way that a public offense has been committed or is about to be committed, remain inactive. His duties are not merely to apprehend those who have committed offenses but to prevent such offenses. The sections of the

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Code quoted make this plain. He is "to keep the peace" and prevent crime." He is to prevent "public offenses" and suppress breaches of the peace. He is the commander in chief of the law forces of the county. All judicial and ministerial officers of justice and all city officials are required to aid him, and the male population of his county is subject to his command "in the prevention and suppression," not only of violent breaches of the peace, but of all public offenses. It is idle to say that all this does not imply initiative on the part of the sheriff in the enforcement of the law against public offenses. The duties imposed cannot be performed without some degree of activity and diligence to inform himself of conditions in his county. Certainly they preclude the idea that he may, without dereliction, shut his eyes to what is common knowledge in the community, or purposedly avoid information, easily acquired, which will make it his duty to act.

We do not mean that it is his duty to patrol the county as the streets of the city are patrolled by the police, or to maintain a detective force to ferret out crimes. All we now decide is that it is the duty of the sheriff and his deputies to keep their eyes open for evidence of public offenses, and that it is a distinct neglect of duty for them to ignore common knowledge of law violation or to intentionally avoid being where they have reason to believe that such offenses are being committed. And to make imperative action in the discharge of his duty to prevent and suppress, it is not necessary that the sheriff shall see, with his own eyes, an offense

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committed or about to be committed. By section 6899, Shannon's Code, it is provided that if he has notice of such offense and does not do his duty in preventing it, he is guilty of a misdemeanor. We hold that knowledge coming to him from any source is "notice" within the meaning of this statute.

Again it is clear that the duties and powers of a sheriff within the limits of an incorporated city are precisely the same that they are in the remainder of the county. The law draws no distinction. The city officials are conservators of the peace. But they do not supplant him. On the contrary, by the express terms of the statute, they are to aid him. He is the chief and they are his assistants. True, there is not ordinarily the same need for vigilance on his part in the city as in the country. One of the chief reasons for the incorporation of towns and cities is to provide in the more densely populated sections, better police protection, than, in the nature of things, the sheriff's office can afford. When, therefore a city has patrolling its streets a police force employed expressly, to detect crime and apprehend offenders, the sheriff, in the absence of information to the contrary, is justified in assuming that the city officials will do their duty, and hence will not be guilty of any serious neglect of duty if he gives little attention to police matters in such city. But if he has reason to believe that the police force is neglecting its duty, or is in league with offenders, it is his duty to inform himself. And, if he knows that the city officials are deliberately ignoring

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or permitting a certain class of offenses, his duty to prevent and suppress such offenses is the same it would be if there was no municipality and no police force.

[The unlawful sale of liquor is undoubtedly a misdemeanor and public offense in Tennessee. Is it not also a breach of the peace? "The term 'breach of the peace' is generic and includes all violations of public peace or order, or acts tending to the disturbance thereof." 5 Cyc. p. 1024, citing many authorities. And this court has said:

"A breach of the peace is 'a violation of public order, the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace.' " *Galvin v. State*, 6 Cold., 294.

The sale of intoxicating liquors has always been recognized as tending to provoke disturbances of good order and breaches of the peace. When such sales were lawful it was found necessary to impose upon them strict regulations to prevent breaches of the peace. Speaking of such a regulation this court long ago said:

"This is a police regulation, for the good order and quiet of the city." *Smith v. Knoxville*, 3 Head. 247.]

See, also, *Webster v. State*, 110 Tenn., 507, 82 S. W., 179.

The original four-mile act, which exempted from its operation incorporated towns, was sustained as a reasonable police regulation for the preservation of peace and good order. And the exception of incorporated towns was justified upon the theory that such towns "would provide the necessary police force, so as to

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keep down disturbances and breaches of the peace that arise out of the sale and use of intoxicating liquors.” *State v. Frost*, 103 Tenn. 694, 54 S. W. 986.

And so when the four-mile law was extended to incorporated towns and cities, the purpose was still to preserve peace and good order. The Legislature of 1877 (Laws 1877, c. 23) considered the sale of liquor without adequate police protection a disturber of peace and good order, and prohibited it. But that Legislature thought that, with such protection as towns and cities could afford, it was possible for liquor selling and peace and good order to coexist. However, after an experience of 32 years, the Legislature of 1909 evidently concluded that the sale of liquor, with or without police protection, was destructive of or, at least, dangerous to peace and good order. Whether we would have reached the same conclusion is immaterial. The Legislature has so declared and we hold that the liquor laws of the state were passed as a means for preserving the peace, and that their violation is a breach of the peace.

We have been cited to no case, and have found none which, in terms, decides that the unlawful sale of liquor is a breach of the peace. But the conclusion we have reached follows irresistibly from the definition of a breach of the peace generally accepted by the courts and from the logic of our cases cited above, and we are entirely satisfied with its soundness. True the unlawful sale of liquors is not a breach of the peace to prevent which the sheriff may arrest a person and re-

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quire him to give bond to keep the peace. That, as we have seen, can only be done when one is armed for the purpose of committing a breach of the peace. It belongs rather to that class which the sheriff is commanded to suppress, and to prevent which, when threatened in his presence, it is his duty to arrest without warrant. It is of the same class and to be dealt with in the same way as the breaches of the peace enumerated in the brief of counsel for defendant, as follows:

“The term, ‘breach of the peace’ is generic, and includes riotous and unlawful assemblies, riots, forcible entry and detainer, the sending of challenges and provoking to fight, going around in public, without lawful occasion, in such manner as to alarm the public, the wanton discharge of firearms in the public streets, engaging in an affray or assault, using profane, indecent, and abusive language by one toward another, on a street and in the presence of others, or being intoxicated and yelling on the public streets in such manner as to disturb the good order and tranquillity of the neighborhood.” 8 Ruling Case Law, p. 285.

[The unlawful sale of liquor being a breach of the peace, it is not always necessary for an officer to actually see a sale before he is authorized to make an arrest without a warrant. If, in his presence, such a sale is threatened, he is authorized to arrest as for any other threatened breach of the peace. The threat need not be in words. If one man puts himself in a position to assault and, by his acts, manifests a pur-

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pose to assault another, a breach of the peace is undoubtedly threatened. How does this principle apply to a threatened unlawful sale of intoxicating liquors? The condemnation of our statutes is confined to the selling of such liquors. It is not unlawful for a man to have liquors, in any quantity, in his home or in his place of business. The mere presence of liquors, therefore, without more, is not a public offense, and will not under all circumstances, indicate a purpose or threat to sell them unlawfully. Thus a stock of liquors in a house from which an interstate shipping business is being done may have no unlawful significance. [But when liquors are found in a place of business fitted up as only saloons are usually equipped, with a bar, bartenders, bottles, glasses, and all the paraphernalia commonly used in places where drinks are served, there can be no doubt of the purpose. Men do not maintain places of that kind except for one purpose. Such a place, standing fully equipped and ready to serve the public, is a constant threat to sell liquor unlawfully and thus breach the peace.] It cannot be that an officer, charged with the duty of preventing breaches of the peace, with this threat before his eyes, and with the certainty that the threat will be carried into execution the moment he is out of sight, is powerless to act because there has not already been a breach of the peace. We emphasize his duty to prevent offenses. And certainly no rights of an individual are violated when he is simply deprived of the privilege of doing that which is unlawful. The interposition of the law to prevent

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a crime is more humane and less harsh than its punishment for one committed.

Our act authorizing an arrest for a threatened breach of the peace was taken from the Alabama Code of 1852. And we quote, with approval, what the Supreme Court of that State has said in sustaining the right of an officer to prevent a threatened breach of the peace as follows:

“Two great and vital principles of government are to be kept steadily in view, in pronouncing on conduct, such as is brought to view in this record; the liberty of a citizen, and the peace and repose of society. Civil liberty is natural liberty, shorn of the excesses which invade and trench on the equal liberty of others. No one can claim the right to violate the law, and precautionary force is justified, to prevent a greater impending evil. Such force, however, is in its nature remedial, and can be carried no further than is reasonably necessary to prevent the threatened wrong. Prevention is less hurtful than redress, and when prudently exercised, is not only justified, but is commended of the law. No man can rightfully complain of any encroachment upon personal liberty, which he himself by his lawlessness or violence has rendered necessary for the safety and protection of others. It is liberty as defined by law, not unbridled license, our free Constitution guarantees to every man—the humblest, equally with the most exalted.” *Hayes v. Mitchell*, 69 Ala. 454.

[We hold therefore, that a person found in control of such a place as we have described is subject to ar-

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rest, without warrant, as for a breach of the peace threatened in the presence of an officer. It may be true that he has not committed any offense for which he may be indicted and prosecuted. But neither has the man who has threatened an assault and battery, or to send a challenge, but has been arrested before he could put his threat into execution. In such cases the arrest is made not for the purpose of inflicting punishment, but to prevent the necessity for punishment. It is not to be followed by imprisonment, unless it shall be necessary to so restrain the offender to prevent the threatened offense. The limit of the force that may lawfully be used to prevent a breach of the peace, as held by the Alabama court, is that it shall "be carried no further than is reasonably necessary to prevent the threatened wrong."]

In the Alabama case referred to it was held that the circumstances might be such as to justify the arresting officer in even putting the offender in jail, the court saying:

"The right to imprison was a question for the jury, under appropriate instructions. There should certainly be no imprisonment, unless the circumstances rendered such imprisonment necessary. If, by reason of the unreasonableness of the hour, or the inaccessibility of the mayor or other magistrate having jurisdiction, the offender could not be then brought to trial; or, if by reason of riotous or lawless conduct, the peace-preserving powers of the marshal were, or seemed to be in request, to maintain the general peace, or, to protect

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others or their property from lawlessness, then it would not be the duty of the marshal to exhaust his entire energies, in personally detaining the prisoner, to the neglect of all other equally pressing duties. In such case, he would be authorized to imprison the offender, until he could be properly brought to trial." *Hayes v. Mitchell*, 69 Ala. 452; *Johnson v. Mayor*, 46 Ga. 80; *Boaz v. Tate*, 43 Ind. 60.

In other words, in obedience to the command to prevent and suppress breaches of the peace, the officer making the arrest is to do whatever, under the circumstances is reasonably necessary to prevent the threatened offense. In the event of an unlawful assembly, he will command that the persons assembled disperse. If the command is obeyed, his duty is done. If it is not obeyed, he will arrest those who disobey and detain them until the assembly is dispersed. *Yerkes v. Smith*, 157 Mich. 559, 122 N. W. 223. If one threatens an assault and is arrested by an officer in whose presence the threat is made, he will be detained until the danger of the assault appears to have passed, and then released. So if an officer finds a saloon, such as we have described, it is his duty to do whatever is reasonably necessary to prevent the threatened sales of liquors. Manifestly his first step will be to arrest the person in charge for a threatened breach of the peace. Having done this, he should detain such person until the danger of the threatened breach of the peace is removed. How this danger can be effectually removed will depend on the circumstances. If this can be done

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by seizing and removing the liquors, such action is within the power of the officer. Or, if necessary, he may close the place of business and keep it closed until the purpose of conducting it as a saloon is abandoned.

It may be said that this involves an arbitrary invasion of property rights. But the law does not hold one's property more sacred than his person. And it must be conceded that his person may be seized when necessary to prevent a breach of the peace.

It is insisted that this calls on the sheriff to render services for which the law provides no compensation. It may be that he will sometimes do things not covered by the fee bill. But, if so, this is nothing more than is incident to the work of men in every walk of life. He must take his office with its burdens as well as its emoluments. Besides when one is arrested for threatening a breach of the peace by maintaining a saloon, it will rarely be the case that sufficient evidence of past offenses will not be found to justify swearing out a warrant upon which the offender can be prosecuted and convicted.

Of course what we have said here does not apply to all places in which liquors are found. We apply it now only to places, like saloons, so fitted up as to be a constant invitation to the public to buy and drink. So applied, the things we have held that the sheriff is authorized to do are nothing more than the defendant himself did in his efforts to enforce the law in the rural districts. In fact these are the very things that all faithful officers, who have really tried to enforce the

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law, have found it necessary to do and have done for years. There has been an impression that such officers were, in fact exceeding their lawful authority. It is time they were authoritatively advised that, in doing these things, so long as they do not abuse their power they have the full sanction and protection of the law.

We are not unmindful of the contention of counsel that an officer has no right to arrest, without a warrant, for a misdemeanor not committed in his presence. That rule is too well understood to require the citation of authorities. Nor do we mean to depart from it. But, under the statute quoted, an arrest may lawfully be made when no misdemeanor has in fact been committed if it is necessary to prevent a threatened breach of the peace. Whatever is a violation of public order or tends to the disturbance of public peace or order is a breach of the peace. In the judgment of the Legislature, the sale of intoxicating liquors is such a violation of good order and so tends to the disturbance of public peace and order that laws have been enacted prohibiting such sales. A violation of these laws undoubtedly violates good order and tends to the disturbance of public peace and order, and, by all the accepted rules of construction and of logic, is a breach of the peace.

For any misdemeanor, whether also a breach of the peace or not, actually committed, no arrest can be made without a warrant, unless the offense is committed in the presence of the arresting officer. But to prevent any offense which is a breach of the peace, threat-

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ened in the presence of an officer an arrest may be made without a warrant. So, to arrest for a sale of liquor, not made in his presence, an officer must have a warrant. But to prevent such a sale, when threatened in his presence, he needs no warrant. Hence when he finds a man in possession of a saloon, with everything ready to serve customers, such a man is undoubtedly threatening, in the presence of an officer, a breach of the peace which he will commit unless prevented. We have no hesitancy in holding that it is the duty of the officer to prevent the breach of the peace by making an arrest. It cannot be that an officer of the law must stand powerless in the presence of complete preparations for a breach of the peace which is sure to be committed as soon as he is out of sight.

Moreover, as we have seen, when the sheriff has notice that an offense is being committed, it is his duty to act in prevention and suppression. This involves the duty to, at least, make some investigation to ascertain the facts. That defendant had notice that saloons were running in Memphis, we do not doubt from the record. And it is impossible that, with saloons running as the record shows they were, the sheriff and his deputies could not, with slight effort, have put themselves in possession of sufficient knowledge to satisfy a justice of the peace that the offense of selling liquor had been committed. Nor do we understand that it was necessary for the officers to actually see sales before swearing out warrants. We are aware that *State v. Good*, 9 Lea, 240, holds that when the infor-

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mant does not know the facts, but has only been informed of them, the justice of the peace is not authorized to issue the warrant. But if any officer knows the facts which reasonably lead to the conclusion that sales of liquor have been made, he is within the rule laid down in that case and is justified in swearing out a warrant, although he may not have actually seen the sales.

We have said that the sheriff is not bound to maintain a detective force. It is also true that there is no statute which, in terms, makes it his duty to swear out warrants or give information to the grand jury. But when he is commanded to prevent and suppress crimes, public offenses, and breaches of the peace, it is incumbent on him to use all the means which the law has provided to accomplish that end. If complaint is made to him or he has notice that an offense has been committed, or is about to be committed, it is his duty to investigate. If an offense is committed or a breach of the peace threatened in his presence, it is his duty to arrest without a warrant. If, upon investigation, he learns facts which show that an offense has been committed, it is his duty to swear out a warrant and make the arrest. If he has reason to believe that an offense has been committed, but does not know facts sufficient to justify his swearing out a warrant, it is his duty to report the matter to the grand jury for investigation. Nothing short of this will be a complete performance of his duty to prevent and suppress crime and public offenses.

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Has the defendant neglected to perform the duties of his office as thus fixed by the law? So far as the county outside of the limits of the city of Memphis is concerned, with a single exception, we think he has not. And, as to this part of the county, his conception of the duties of his office was just about as we have stated them to be. Some criticism is made of his conduct with respect to the sale of liquor at certain roadhouses. But it appears that he made numerous arrests, a number of raids, destroyed considerable quantities of liquors, and secured many indictments. On the whole we think he acted in good faith and with reasonable vigor in the effort to enforce the liquor laws outside of the city of Memphis with a single exception to be now referred to.

The Tri-State Fair was held in September, 1914, just outside the limits of Memphis. At some time between defendant's election, in August, 1914, and his induction into office on September 1st, in a conference at which he (Mayor Crump) and the chief of police of Memphis were present, he was asked if he would permit liquor to be sold on the fair grounds. He at first replied that he would not, as that would be a prostitution of his office. But, after some remarks by the mayor, he said that if as many as ten of the directors of the fair would ask it in writing, he would agree. This is the version as given by the chief of police. The defendant does not deny it and Mr. Crump was not called as a witness. The chancellor accepted it as true, as do we also. It does not appear that the petition suggested was ever signed or presented. But it does appear that beer and

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whisky were sold openly on the grounds during the fair, and that defendant was present and could not have been ignorant of the sales, though he may have avoided actually seeing them. The agreement, made before he became sheriff, could not be made a ground for his removal, unless it was afterwards carried out. We do not know whether the directors ever signed a petition as suggested, nor do we know that defendant ever formally waived the petition as a condition to his agreement. But whether by his express agreement or not, intoxicating liquors were sold openly on the grounds, and he was present and took no steps to prevent it.

In the city of Memphis, defendant admits that he did nothing toward enforcing the liquor laws except to serve such process, principally in injunction cases, as was placed in his hands. He was personally and politically on the most intimate terms with the mayor of Memphis. Whether by formal agreement or tacit understanding or on his own motion, it is manifest, from his own testimony, that he was content to leave the enforcement or nonenforcement of the laws against selling intoxicating liquors entirely to the city authorities. At the same time he admits that he knew that, from September 1, 1914, to January 29, 1915, the city authorities were making no effort to enforce these laws, and that, from May to October, 1915, they were merely arresting liquor dealers, collecting \$50 from each, and binding none of them over to the grand jury. His fail-

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ure to act, under these circumstances, was a clear neglect to perform the duties of his office.

The excuse is offered that, when he was inducted into office the state was proceeding against liquor dealers by injunction suits and that this was the most effective weapon against them. But this is only an additional means of enforcing the law and relieves no officer of any of the ordinary duties of his office.

It is also urged, in excuse, that the officials of the criminal court were so derelict in the discharge of their duties that nothing would have been accomplished by having offenders bound over to the grand jury. But, however, this may have been, the derelictions of other officials cannot excuse him for failure to do what the law plainly required him to do for the prevention of public offenses. Besides it is conceded that, during a portion of his term, the chancery courts were very active and the counsel employed by the Governor very energetic in proceeding against dealers by injunction. In these proceedings, defendant gave no aid except to serve process. If he really desired to enforce the law and felt that his efforts were being obstructed in the criminal court, a report to the official in charge of these proceedings would have brought most effective aid. It is said, however, that the Nuisance Act does not impose any duty on him. It is true that act does not mention the sheriff, and he is not authorized to institute any proceeding under it. But neither is there any act which, in terms, says that he shall, under any circumstances, swear out a warrant or give information to the

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grand jury and, counsel say, no statute says that he shall ever make an arrest without a warrant; the only provision being that he may do so in certain cases. But he is commanded to preserve the peace and prevent and suppress public offenses. And we hold that this makes it his duty to use all the machinery which the law provides to accomplish that result. It is his duty to cooperate with all other officials who are charged with duties looking to the same end. If, therefore, he found that the enforcement of the law was being obstructed in the criminal court, while this would not relieve him of the duty to have offenders bound over, it would impose the additional duty of enlisting the aid of those in charge of injunction suits.

In reaching these conclusions, we have not, we think, put any harsh or strained construction on the law. We have only held that the sheriff must be a real conservator of the peace and, to that end, must, in good faith, use all the power which the law gives him to prevent and suppress public offenses.

It is not to be expected that any sheriff can so conduct his office that no liquor will be sold in his county any more than that there will be no such crimes as larceny, disturbing public worship, or assault and battery. And no sheriff who, with reasonable intelligence, makes an honest effort to prevent and suppress public offenses of all kinds has anything to fear from the courts.

The inquiry of counsel as to what defendant could have lawfully done is a pertinent one. We have no

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right to condemn him, unless we can show what the law made it his duty to do. But what we have said furnishes, we think, a denite answer to that question. We have no doubt, from the record that, during at least a portion of his term he had notice that a number of saloons were being run openly and that the city authorities were doing nothing to suppress them. It is equally clear that no efforts were being made to conceal their operations from his force. What could he and his deputies have done? (1) They had only to step into these places, observe a sale, and make an arrest for an offense committed in their presence, or if they found the place ready for business, but saw no sales made, they could have made an arrest for a breach of the peace threatened in their presence, and could then have seized the liquor or closed the place, as under the circumstances, would have been reasonably necessary to prevent sales being made. (2) With notice of these open saloons a slight investigation would have put his deputies in position to swear out warrants. (3) If his efforts had been obstructed in the criminal court, he could have reported to the official in charge of injunction suits and secured effective aid.

We have not overlooked the authorities cited by counsel but have considered them. Most of them are not in conflict with what we have held.

Commonwealth v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475, simply holds that for statutory misdemeanors, not amounting to a breach of the peace, an officer has no authority to ar-

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rest without a warrant, though the offense be committed in his presence, "unless it is given by statute." But our statute extends the authority to all "public offenses."

Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 7 L. R. A. 507, 18 Am. St. Rep. 473, holds that a police officer cannot, without a warrant, lawfully arrest a woman upon mere suspicion that she is on the street for the purpose of plying her vocation as a prostitute.

Jamison v. Gaernett, 10 Bush (Ky.) 221, merely denies the power of an officer to arrest, without warrant, for an assault not committed in his presence.

Robison v. Minor, 68 Mich. 549, 37 N. W. 21, and 8 Ruling Case Law, p. 258, citing a Florida case holding that carrying concealed weapons is not a breach of the peace, as well as some other cases, not cited, but which we have examined, are, in principle, more or less in conflict with our holding that the unlawful selling of liquor is a breach of the peace. But, we think, they are not supported by the weight of authority or reason.

It is not necessary to discuss other charges of the bill further than to say, in fairness to defendant, that we do not find that the charges of official oppression and demanding and receiving illegal fees are sustained by the record.

For the reasons stated, the decree of the chancellor must be reversed, and a decree entered here, removing defendant from the office of sheriff of Shelby county.

In the record of this case, no effort has been made to comply with the rule requiring bills of exceptions

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to state the evidence in narrative and condensed form. Nor has any abstract of the evidence been filed. The bill of exceptions consists of a literal transcript of what occurred on the trial, including numerous lengthy arguments by counsel, making six large volumes. It is insisted by defendant's counsel that the court ought not to examine the testimony, but should decide the case on the facts set out in the opinion of the chancellor. In view of the summary character of this proceeding and the expressed purpose of the legislature that it should speedily be disposed of on its merits, and the short time between the trials below and here, we have not done this, but have examined the entire record. Our conclusions in the main, are based however, on the facts found by the chancellor to be true.

But we do not think the additional cost resulting from failure to comply with the rule should be borne by the defendant. Three-fourths of the cost of the transcript will be taxed against Shelby county. The remainder of the costs of this court as well as the costs of the court below will be paid by the defendant.

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STATE EX REL. THOMPSON, ATTY. GEN. v. REICHMAN.

(*Jackson*. April Term, 1916.)

1. SHERIFFS AND CONSTABLES. Title to office. Ground for removal.

A sheriff who has made an honest and reasonably intelligent effort to do his duty will not be removed by the courts, though his efforts may not have been wholly successful, his right to continue in office depending rather on the good faith of his efforts than on the degree of his success. (*Post*, pp. 692-697.)

Case cited and approved: *State v. Howse*, 134 Tenn., 89.

Cases cited and distinguished: *South v. Maryland*, 18 How., 396; *Scougale v. Sweet*, 124 Mich., 323.

2. SHERIFFS AND CONSTABLES. Powers and duties. Notice of violation of law.

When a sheriff learns that a city in his county is collecting tribute from numerous liquor dealers and leaving them otherwise undisturbed, this is notice to him that the law is being violated and no effort made to enforce it. (*Post*, pp. 697-700.)

Case cited and approved: *Jones v. State*, 100 Ala., 90.

3. ARREST. Without warrant. Duties of sheriff.

While a sheriff need not make a forcible entrance into a suspected residence or place of business to discover violations of the liquor law, he or his deputies should enter open saloons and make arrests if justified by what they see therein. (*Post*, pp. 697-700.)

4. BREACH OF THE PEACE. Elements. "Peace."

The word "peace," in the phrase "breach of the peace," means the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members; that invisible sense of security which every man feels necessary to his comfort, and for which all governments are instituted. (*Post*, pp. 700-706.)

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Cases cited and approved: *Galvin v. State*, 46 Tenn., 294; *Davis v. Burgess*, 54 Mich., 517; *State v. Coffin*, 64 Vt., 27; *People v. Ruggles*, 8 Johns. (N. Y.), 290; *Lindenmuller v. People*, 33 Barb. (N. Y.), 548; *State v. O'Rourke*, 35 Neb., 614.

Cases cited and distinguished: *Jones v. State*, 100 Ala., 90; *Ware v. Branch Circuit Judge*, 75 Mich., 493.

5. BREACH OF THE PEACE. Elements. Violation of statute. "Breach of the peace," in view of the generally accepted definition, and of constitutional provision that all indictments shall conclude, "against the peace and dignity of the State," includes any violation of any law enacted to preserve peace and good order. (*Post*, pp. 700-706.)

6. INTOXICATING LIQUORS. Offenses. Statutory provision. Shannon's Code, Sec. 993, subsec. 2, requiring every applicant for a liquor license to give bond to keep a peaceable and orderly house, is a legislative declaration that the liquor law is intended to preserve the peace, so that any violation thereof is a breach of the peace. (*Post*, pp. 706-710.)

Case cited and approved: *Dyer v. State*, 19 Tenn., 250.

Code cited and construed: Sec. 993, subsec. 2 (S.).

7. INTOXICATING LIQUORS. Offenses. Nuisance. Breach of the peace.

Engaging in the sale of intoxicating liquors, declared by Act 1913 (2d Ex. Sess.) chapter 21, to be a nuisance, is among that class of nuisances always treated by the court as tending to disturb the peace and good order of the community. (*Post*, pp. 710-713.)

Cases cited and approved: *Childress v. Mayor & Aldermen*, 35 Tenn., 358; *State v. Graham*, 35 Tenn., 134; *Delk v. Commonwealth*, 166 Ky., 39.

Cases cited and distinguished: *Graham v. State*, 134 Tenn., 285; *Legg v. Anderson*, 116 Ga., 401; *State v. Tabler*, 34 Ind. App., 393.

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8. SHERIFFS AND CONSTABLES. Powers and duties. Enforcement of law.

That Acts 1913 (2d Ex. Sess.) chapter 2, declaring a saloon a nuisance, provides a method for its abatement, merely furnishes a cumulative remedy, and does not abrogate any other remedy or affect a sheriff's duties. (*Post*, p. 713.)

9. INTOXICATING LIQUORS. Offenses. "Disorderly house."

A saloon run in violation of law is a "disorderly house," which is defined as any place where illegal practices are habitually carried on; and hence a saloon open, equipped, and ready for business is a threat to breach the peace, if not in itself a breach of the peace. Citing Words & Phrases, Second Series, Disorderly House. (*Post*, pp. 713, 714.)

10. BREACH OF THE PEACE. Elements. Violence.

It is not necessary that an act have in itself any element of violence in order to constitute a breach of the peace. (*Post*, pp. 714-731.)

Cases cited and approved: *Davis v. Burgess*, 54 Mich., 517; *Roberson v. State*, 43 Fla., 156; *Judy v. Lashley*, 50 W. Va., 628; *Hurd v. State*, 119 Tenn., 584; *McLennon v. Richardson*, 15 Gray (Mass.), 74; *Cornett v. Commonwealth*, 78 S. W., 858; *Delk v. Commonwealth*, 166 Ky., 39; *Scougale v. Sweet*, 124 Mich., 311; *Yerkes v. Smith*, 157 Mich., 557; *In re Kellam*, 55 Kan., 700.

Cases cited and distinguished: *Davis v. Burgess*, 54 Mich., 517; *State v. Warner*, 34 Conn., 276; *Ware v. Branch*, 75 Mich., 496; *Robinson v. Miner*, 68 Mich., 549; *In re Carroll*, 12 Wkly. Law Bul. (Ohio), 9.

11. SHERIFFS AND CONSTABLES. Powers and duties. Arrest.

On making an arrest for a threatened violation of the liquor law, the sheriff should take such steps as are necessary to prevent the threatened sales, as, in case of a saloon open for business, by closing it till the liquors are removed, and then release the offender and leave future sales and future threats to be dealt with as they arise. (*Post*, pp. 731-737.)

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Case cited and approved: *Shanley v. Wells*, 71 Ill., 78; *O'Connor v. Bucklin*, 59 N. H., 589; *Ross v. Leggett*, 61 Mich., 445; *Ex parte Morrill*, 35 Fed., 261; *McCrowell v. Bristol*, 73 Tenn., 685.

Cases cited and distinguished: *Ellenbecker v. District Court*, 134 U. S., 31; *Spalding v. Preston*, 21 Vt., 9; *Quinn v. Helsel*, 40 Mich., 578.

12. SHERIFFS AND CONSTABLES. Powers and duties. Willful neglect.

In proceedings to remove a sheriff for failure to enforce the liquor law, he is precluded, by his admission that he did nothing in a city within his county but to serve process where liquor was openly sold in violation of law, from asserting that no willful neglect of his duty has been shown. (*Post*, pp. 737-739.)

ON PETITION TO REHEAR

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Judge.

G. T. FITZHUGH and F. M. THOMPSON, Attorney-General, for appellant.

T. K. RIDDICK and C. M. BRYAN, for appellee.

MR. W. L. FRIERSON, Special judge, delivered the opinion of the court.

In a very earnest petition to rehear we are asked to reconsider our opinion in which it was held that the defendant should be removed from the office of sheriff of Shelby county.

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When the cause was heard three members of the court were absent and their places occupied by special judges. In view of this fact, an oral argument of the petition has been permitted, and the conclusions now announced reached by the court, composed of four regular members and the writer sitting as a special judge.

As counsel seem to be under some misapprehensions, we will restate briefly what was decided.

The facts which we held justified defendant's removal were these:

(1) During the Tri-State Fair, which was held in September, 1914, in Shelby county outside the corporate limits of the city of Memphis, intoxicating liquors were sold openly on the fair grounds, and he was present and took no steps to prevent it, although he had previously said that to permit it would be to prostitute his office.

(2) During his term as sheriff, although, with the exception above stated, he made an honest effort to enforce the liquor laws in the rural districts, he did nothing toward enforcing them in the city of Memphis, except to serve such process as was placed in his hands, in spite of the fact that during at least a part of the time there were a great many open saloons running, and he knew that during a portion of his term the city authorities were doing nothing either to prevent or punish violations of the liquor laws, and during another part of his term they were merely

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arresting liquor dealers, requiring, in each case, the payment of \$50 to the city, and binding no one over to the grand jury, but leaving offenders undisturbed in their places of business, and immune from punishment under the laws of the State.

None of these facts have been challenged by the petition to rehear or the argument in support of it except it is insisted that, though liquor was being sold in many places, there is "no definite and sufficient proof" that any of these places were open saloons, or, if so, that defendant knew of them. But this contention does not deny that he knew that the city authorities were, in effect, shielding numerous offenders from prosecution by exacting tribute to the city and leaving them free to continue their unlawful business. He, therefore, knew that, to the extent of protecting them from punishment in the State courts, the city officials were in league with the offenders. We are, however, entirely satisfied that, at least for a considerable time before this proceeding was commenced, there were many open saloons in Memphis, not a few of them in the business section of the city, and some of them being conducted with such openness that sales over the bar could be observed from the street. The record shows that there were numerous places in Memphis where complete strangers could and did go, and, without question or difficulty, purchase intoxicating drinks, and have them served just as such drinks are ordinarily purchased and served in saloons, and that many of them had all the well-

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known *indicia* of open saloons. And the evidence leaves no doubt that these facts were generally known in the community. We have accepted as true defendant's statement that he was not in a saloon during his term and did not actually see a sale of liquor. Indeed we have found, in the record, no reason to doubt his entire truthfulness as a witness. But his testimony, as a whole, admits a knowledge that the city authorities were permitting liquor dealers to continue their business upon the payment of an occasional \$50, and contains no denial of the circumstances shown from which he could have had no doubt that these laws were being ignored and extensively violated. And the slightest effort would have given him actual knowledge of the conditions. The saloons were as open to him as to the public. In entering them, he would no more have been a trespasser than any other citizen. The record satisfies us that the persons in charge of these places felt perfectly secure from interference by the sheriff or his deputies, and that their appearance would have caused no suspension of operations and they could easily have seen what the other witnesses saw. The conclusion must be that he did not see open saloons and liquor sales because it was not his policy to see them. That this was, in fact, his attitude is obvious from the testimony that on one occasion he learned that the city authorities had arrested, for liquor selling, the keeper of a place where some of his deputies were accustomed to eat lunch and advised them not to go there any more.

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Under these circumstances it cannot be unfair to hold him to the duties which rest upon a sheriff who knows that saloons are being run openly in his county. We have accordingly based his removal upon his total and intentional neglect of any effort to suppress saloons or other places where liquor was sold openly.

• We have not undertaken to determine what degree of failure to suppress bootlegging or other secret methods of selling liquor would justify the removal of a sheriff. It is sufficient now to say that the law is not unreasonable and does not require impossibilities of the sheriff any more than of any other person. The inquiry always must be whether he has made an honest and reasonably intelligent effort to do his duty. If he has done this, the courts will not remove him, though his efforts may not have been wholly successful. In other words, his right to hold his office depends upon the good faith of his efforts rather than upon the degree of his success. The fact that a few or many violations of the law have occurred in his county will never, without more, justify his removal. His good faith, or lack of it, must be determined by the circumstances of each case. In the present case we are relieved of the necessity of going into these questions, because we are dealing with a defendant who expressly admits facts which show that, so far as the city of Memphis is concerned, he had every reason to believe that the law was being constantly violated and made no effort to do anything.

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In concluding that the facts stated above required defendant's removal, we made the following rulings as to the duties of a sheriff:

(1) He is the chief conservator of the peace in his county and expressly required to keep the peace, and to prevent and suppress public offenses and breaches of the peace.

(2) Ordinarily he may rightfully assume that the police officers of incorporated towns and cities will do their duty, and hence will be guilty of no serious neglect of duty if he gives but little attention to police matters in such places. But if he knows, or has reason to believe, that they are neglecting their duty or are in league with offenders, his duties are the same as in the rural districts.

(3) He is not a mere process server, but his duties require initiative on his part in the enforcement of laws against public offenses. It is therefore his duty to exercise the powers conferred upon him, and to use the means provided by law to accomplish the prevention and suppression of public offenses.

(4) He must use a reasonable degree of diligence to inform himself of conditions in his county, and will be derelict if he shuts his eyes to what is generally known in the community, or purposely avoids information, easily acquired, which will make it his duty to act.

(5) If he has notice of any public offense, it is his duty to act in its prevention.

With respect to the means which the law affords for the performance of these duties, we held:

(1) For any public offense committed in his presence the sheriff may, without a warrant, arrest and take before a justice of the peace the offender for punishment.

(2) For a misdemeanor committed, but not in his presence, he has no authority to arrest without a warrant.

(3) To prevent any offense, which is also a breach of the peace, *threatened* in his presence, he may arrest without a warrant and use such force as may be reasonably necessary to prevent the threat being carried into execution.

(4) If he knows or has reason to suspect that any person is *armed* for the purpose of committing certain offenses, he may arrest without a warrant and take before a justice of the peace such person, to the end that a bond to keep the peace may be required.

(5) Except as just stated, he is in no case authorized to make an arrest without a warrant, upon suspicion or information received from others that a misdemeanor, whether also a breach of the peace or not, has been committed or is about to be committed.

(6) He has no authority to swear out a warrant merely upon facts of which he has been informed by others. In such cases he may report the matter to the grand jury, with the names of his informant and such other witnesses as may be known to him.

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(7) But if he knows of his own knowledge such facts as reasonably make a case, he may himself swear out a warrant and then arrest the offender.

The authorities were cited in our former opinion. And the rulings as stated are not now questioned, except in so far as they impose upon the sheriff the duty of taking the initiative. It is conceded that his powers are correctly set out above. But it is denied that he is under any positive duty to exercise these powers, at least when, though having notice of offenses, he does not actually see an unlawful act. But this involves a total misconception of the nature of the office of sheriff as it has been known to the law from time immemorial.

"The powers and duties of conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace." *South v. Maryland*, 18 How., 396, 15 L. Ed., 433.

He is, "in his county or bailiwick, the representative of the king or sovereign power of the State to preserve the peace." 25 Am. & Eng. Enc. of Law, p. 662. The chief magistrate clothed, in his county, with the executive power of the State, the representative of the king, or, in America, of the sovereignty of the State, cannot be said, with any show of reason, to be a mere process server who may stand passive and see the laws of the State trampled upon unless some citizen places process in his hands directing him to

act. For the punishment of offenses which injure a citizen in his person or property we may sometimes expect the injured person to start the machinery of the law. But for the enforcement of those laws intended for the protection of the public at large, and in which no one citizen has any more direct interest than another, practically the sole reliance must be upon those officers who are made the guardians of the peace of the State, chief among whom is the sheriff.

Answering the suggestion that a sheriff could discharge his duty by standing ready to serve any warrants that might be issued, the Supreme Court of Michigan has said:

“We cannot shut our eyes to the fact that this has been a common excuse of sheriffs and other police officers for not enforcing this and other laws. It is the duty of the sheriff and police officers generally to enforce those laws which the people have enacted for the protection of their lives, persons, property, health, and morals.” *Scougale v. Sweet*, 124 Mich., 323, 82 N. W., 1065.

That case is also authority for the statement that, when information comes to the sheriff that an offense is about to be committed, it is his duty to make an honest, and not a pretended, effort to ascertain the facts and be at the place to prevent the offense. This is all in accord with our ruling. And we are satisfied that we have not charged the defendant with any higher measure of duty than the law imposes on him. When the statute directs him to prevent and suppress

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public offenses, and says that when he has notice of such offenses, it is his duty to act in prevention of them, it plainly intends that he must use all, or so much as may be necessary, of the means to that end which are at his command.

Applying these rules, we held that defendant was guilty of a distinct neglect of duty in making no effort to prevent the sale of liquor at the Tri-State Fair. The facts as we have stated them are not challenged by the petition to rehear. It cannot be said that this neglect was not knowing and willful, for he himself had previously said it would be a prostitution of his office. His removal could well have been rested upon this alone.

But it was not necessary to base our decision upon a single isolated failure to do his duty, occurring at the beginning of his term. In view of the facts, as we have found them, his admission that he did nothing in the city of Memphis toward enforcing these laws furnishes ample reason for his removal. *State v. Howse*, 134 Tenn., 89, 183 S. W., 510.

When he learned, as he did, that the city was collecting tribute from numerous liquors dealers and leaving them otherwise undisturbed in their places, this was notice to him that the law was being constantly violated, and that no proper effort was being made to suppress the offenses or punish the offenders. The slightest desire to perform the duty which we have held was his would have suggested a visit to these places. His offense was in keeping away

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from places where he had every reason to believe that the laws were being violated. It was the offense of willful neglect of duty rather than positive wrongdoing. For an officer to purposely avoid being where he has reason to believe that an offense will be committed is as serious and willful a neglect of duty as a failure to arrest for an offense committed in his presence. The decision could well be rested upon his failure, with the notice he had to locate these saloons or at least some of them. We do not mean that it was his duty to break open any doors, or to make a forcible entrance into any suspected residence or place of business for the purpose of searching. Dealing with the case before us, we merely hold that he had the same right that the general public had to enter these places and observe what was open to observation, and that it was then his duty to take such action as would be justified by what he saw. If he had taken this course, the result cannot be doubted. At least until some arrests had been made, we are satisfied that all he or his deputies had to do was to walk into these places, observe sales, and make arrests. He neglected to make the attempt. Of course, when it became known that the sheriff's office proposed to do its duty, precautions would be taken to avoid making sales in the presence of the officers. If then the officers should see no sales made, but should find a federal license displayed, and observe other facts reasonably showing that sales had been made, they could swear out warrants. If, how-

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ever, they should not discover facts sufficient to make a *prima facie* case, but found circumstances leading them to believe that the law had been violated, they could report the matter to the grand jury, with the names of such witnesses as they could furnish. And it would be their duty to do such of these things as might, under the circumstances, be necessary. In the present case the defendant neglected to take the first step by going or sending his deputies to the places where he had reason to believe liquor was being sold. But this neglect, of course, cannot excuse him for not doing the things which it would have been his duty to do if he had taken the first step. He must therefore stand convicted of a neglect of all the duties which would have been his if he had gone to these saloons. What has been said thus far applies whether the offense in question is or not also a breach of the peace. We have but stated the long-recognized duties of a sheriff with respect to all public offenses. But in the case of an open saloon, if no sale is made in the presence of an officer, if no federal license is displayed, and he acquires no such knowledge as will justify him in swearing out a warrant for past sales, but he finds a stock of liquors, complete bar equipment, and such a state of preparedness as to make it certain that sales will be made as soon as his back is turned, must he leave the person in charge undisturbed, and let the enforcement of the law await the slow process of an investigation by the grand jury? We cannot think so. In the presence of such an un-

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equivocal threat, must the chief law officer of the county, charged with the duty of preventing such offenses, wait until the offense has actually been committed? We cannot agree that the law is so impotent. The sheriff is expressly authorized by our statute to take preventive measures when a breach of the peace is *threatened* in his presence, and, to that end, to make an arrest without a warrant. After a review of the authorities, and a consideration of the manifest purpose of the legislature, throughout the history of the State, in the passage of liquor laws, we held that the unlawful sale of intoxicating liquors is a breach of the peace which it is the duty of the sheriff to prevent when threatened in his presence, and that a saloon, stocked with liquors, fully equipped and ready for business, is such a threat. It is against this holding that the petition to rehear is chiefly directed.

If a violation of the law against the sale of liquor is a breach of the peace, it is conceded that an officer may, without a warrant, arrest for a violation of that law threatened in his presence. And it will scarcely be doubted that the maintenance of a saloon, ready for business, constitutes such a threat. It has been said that any act which reasonably threatens such a violation justifies an arrest as for a threat. *Jones v. State*, 100 Ala., 90, 14 South., 772. The inquiry then is narrowed to the question as to what constitutes a breach of the peace within the meaning of our statute.

It must be remembered that the term "breach of the peace" is not used to describe any specific crime

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or offense. It is generic and embraces many acts which are indictable as separate offenses. Speaking generally, the definition adopted in *Galvin v. State*, 6 Cold., 294, according to which it includes all unlawful acts and acts of public indecorum which disturb, or tend to disturb, public peace or good order, is that which is laid down in all text-books and accepted by practically all courts. It has been succinctly described as "a criminal act of the sort which disturbs the public repose." 1 Bishop's Criminal Law, section 536. A great multitude of cases, from almost every State in the Union, in which substantially this definition has been adopted, could be cited. But this is unnecessary, since, we believe, there is no dissent from the general definition. The only difficulty is in applying it to particular facts. It seems to be clear, then, that any act which is unlawful, and which disturbs or tends to disturb peace and good order, is within the accepted definition of a breach of the peace. And the word "peace" in this connection has also come to have a fixed meaning. It means, "the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members," or, "that invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted." *Davis v. Burgess*, 54 Mich., 517, 20 N. W., 540, 52 Am. Rep., 828; *State v. Coffin*, 64 Vt., 27, 23 Atl., 632.

The difficulty in applying this general definition to particular facts will, we think, largely disappear if

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we will bear in mind the distinction between those breaches of the peace which are offenses against individuals, and those which are offenses only against the public at large or the State, and remember that what is said of the one class is not necessarily true of the other. Thus it has been said:

“The offense may consist of acts of public turbulence or indecorum, in violation of the common peace and quiet, or of an invasion of the security and protection which the law affords every citizen, or of acts such as tend to excite violent resentment. Actual personal violence is not an element of the offense, but when the incitement of terror or fear of personal violence is a necessary element, the conduct or language of the wrongdoer must be of a character to induce such condition in a person of ordinary firmness.” 5 Cyc., p. 1024.

By this we understand that there are some breaches of the peace in which the “incitement of terror or fear of personal violence is a necessary element,” and, as to these, the act complained of must be such as to reasonably produce terror or fear. They consist of offenses which invade the security and protection which the law affords the individual citizen, and as to which it is sometimes, and probably generally, held that there must be some kind of violence, either actual or threatened. But the language quoted clearly implies that there is a class of breaches of the peace into which the element of incitement to terror or actual fear does not enter, but which are offenses merely

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because they are incompatible with the tranquility and good order which governments are organized to maintain.

The distinction is well illustrated in *Ware v. Branch Circuit Judge*, 75 Mich., 493, 42 N. W., 998, where it was said:

"It is a significant fact that very few, and it may perhaps be said that none, of the recognized books of authority on the criminal law contain any such title as 'Breach of the Peace,' with a definition of it. The books almost universally divide crimes into classes; and breaches of the peace, so far as they are found defined at all, are found either as offenses against the lives and persons of individuals, or as public disturbances, except where for certain reasons they are made felonies."

And in the same case the court said:

"The only cases of breach of the peace, not involving open disturbance in public places, and to the actual annoyance of the public at large, or persons employed, and actually engaged in public functions, require personal violence, either actually inflicted or immediately threatened."

Thus those acts which are breaches of the peace because they are disturbances in public places, or because they are an annoyance to the public at large or persons engaged in public functions, are carefully excluded from the rule requiring violence, actual or threatened, as an element of the offense. Those offenses described as an annoyance to the public at

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large include those which are "a gross violation of decency and good order," *People v. Ruggles*, 8 Johns. (N. Y.), 290, 5 Am. Dec., 335; "acts which tend to corrupt the morals and debase the moral sense of the community," *Lindenmüller v. People*, 33 Barb. (N. Y.), 548; and those which furnish an "evil example of a defiance of the law," *State v. O'Rourke*, 35 Neb., 614, 53 N. W., 591, 17 L. R. A., 830.

In *Ware v. Branch*, supra, the offense sought to be punished as a breach of the peace consisted of obscene language used by one in the home of another. There was no element of threat or fear. Speaking of the offense, the court said:

"As described, the performance was the vaporing of a filthy minded person whose tongue was loosed by drinking, and who was certainly an unsavory and undesirable visitor, but nothing legally worse."

There was no claim that the conduct complained of was a public disturbance, for it was said:

"The only ground on which relator has endeavored to base a claim of breach of the peace is that this language was calculated to provoke violence."

The court was therefore dealing with an alleged breach of the peace of the class which invades the rights of individuals. Hence what was said as to the necessity for violence must be referred to that class, and has no application to the class consisting merely of offenses against the public or the State. The courts have not always kept this distinction in mind, and to this fact is due whatever confusion may be found in the authorities.

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- In England the sheriff was the keeper of the King's peace. In America he is the keeper of the peace of the sovereign people or the State. We think it cannot be said that this peace of the sovereign is not breached or disturbed by any infraction of the laws, at least those enacted for the purpose of preserving good order. It is in this broad sense, we think, that the term is used in the statute authorizing arrests for threatened breaches of the peace. We have no statute which undertakes to define breaches of the peace, and no statute attempting to enumerate all offenses which are breaches of the peace. But our Constitution (article 6, section 12) provides that all indictments shall conclude, "against the peace and dignity of the State." It is difficult to construe this otherwise than as a constitutional declaration that every indictable offense shall be regarded as against the peace of the State; that is, a breach of the peace. And when we remember that every unlawful act which tends to disturb good order is a breach of the peace, what can be more logical than to say that every violation of a criminal law is a breach of the peace of the State? How, in a country where law is supreme, can an act be at once orderly and criminal? If this be the meaning of the Constitution, then an officer is authorized to arrest for any indictable offense threatened in his presence. And this is the construction placed upon the statute of Alabama, from which ours was copied, by the courts of that

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State. We quote from *Jones v. State*, 100 Ala., 90, 14 South.; 773:

“It is alike the law and common knowledge that such officers may arrest without warrant, either to preserve peace and good order or to prevent a threatened violation of the law. . . . The officer may arrest upon seeing such acts as show a reasonable ground for making the arrest; and an act done in his presence which is violative of a general law, or of a municipal ordinance, or which reasonably threatens such violation, authorizes arrest without warrant.”

We are aware, however, that there are authorities which recognize some violations of law as not involving a breach of the peace, and it is not necessary for us now to decide whether, under our Constitution and statutes, this distinction exists. Certainly it cannot be denied that a law enacted to preserve peace and good order is a legislative declaration that the prohibited act at least tends to disturb good order. And the infraction of such a law must be a breach of the peace.

That our liquor laws have been enacted for the preservation of peace and good order will scarcely admit of a doubt. From the earliest history of the State, the legislature has recognized the unrestricted retailing of intoxicating liquors as wholly inconsistent with peace and good order, and has placed upon it restrictions and regulations not deemed necessary in the case of any other business. As early as 1838, this court, speaking through Judge Turley, reviewed

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the legislation on the subject from 1779 up to that date, and showed that the retailing of intoxicating liquors had always been regarded as dangerous to public peace and productive of disorder; that there had never been a time in Tennessee when persons were permitted to engage in it except under regulations intended to minimize the evils and disturbances known to flow from it; that, with ever increasing anxiety, the legislature was constantly imposing new regulations upon the traffic; that the effort at first was to confine "this dangerous privilege" to persons of probity and trust by permitting none to exercise it except persons who had obtained a license to keep an ordinary; that this proving insufficient "to control within proper limits the evils resulting from retailing spirituous liquors," it was confined to those who could satisfy the county court that they were of sufficient probity and not addicted to any gross immorality; that this failed to accomplish the desired purpose, and the legislature, "being determined to find a remedy for the evil," enacted that the privilege should be confined to those who could, by creditable witnesses, show that they were of good moral character and were provided with bedding, stables, and house room for the accommodation of lodgers and travelers, and that their design was in good faith to keep a house of public entertainment, and that the retailing of liquors was not the principal object in asking a license; that the taxing of the privilege was next tried; that almost immediately the placing of

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further restrictions upon the business was begun by requiring an oath not to sell to slaves and not to permit gaming on the premises. *Dyer v. State*, 19 Tenn. (Meigs), 250.

A mere recital of these acts leaves no doubt that the legislature was all the time struggling to guard against and minimize the breaches of the peace which it recognized as inevitably resulting from, at least, the unrestricted sale of intoxicating liquors. This view is confirmed by subsequent acts, too numerous to mention, by which sales were prohibited at places and on occasions when and where breaches of the peace would be most annoying and dangerous to the public, and peace and order most important.

It may be said that the chief purpose of the original four-mile law was the protection of the morals and habits of the youth of the State while attending colleges and universities. As the prohibition was only against sales within four miles of incorporated institutions of learning, this may be true, though, we think, there was also present in the legislative mind a purpose to protect these institutions from the disorders and disturbances of the peace which had been found to attend the sales of liquor in their vicinity. But whatever may be said of the purpose of the original act, no doubt can be entertained of the legislative purpose in passing the acts by which its operation was extended. It is a part of the history of the State that the object in the first extension, was to rid the people of crossroads groceries, with their attendant

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turbulence and disorder, which had become a menace to the peace of almost every rural community, and that the idea of the four-mile law was seized upon to accomplish that result. So productive of disorder did the legislature evidently regard the business of selling liquor that it was thus confined to where the public could have the police protection afforded by incorporated towns and cities. These laws, as well as numerous ordinances passed by towns and cities, were upheld by this court as enacted for the preservation of peace and good order. And when, after years of trial, the legislature extended the law so as to make it apply to towns and cities, the conclusion would seem to be that it decided that, in the presence of liquor selling, even such police protection was not sufficient to preserve the peace as it should be preserved.

We are not unmindful that considerations of morals and health also enter into the passage of such measures. But the fact that other considerations have combined with a purpose to preserve the public peace and order do not denude them of their character as peace measures.

But, if any express legislative declaration was necessary to give these laws the character we have ascribed to them, we have such a declaration in a statute to which we have not yet referred. After prohibiting the retailing of liquor without a license, the legislature enacted, in effect, that a license should be issued to no person until he should have given a bond to keep the peace in his place of business. We

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refer to Shannon's Code, section 993, subs. 2, by which the applicant for a license is required to give a bond, one of the conditions of which is that he will "keep a peaceable and orderly house." This act has never been repealed, and the present prohibition against selling liquors is confined to places within four miles of a schoolhouse. If, therefore, a place can be found not so located, the business may still be lawfully conducted, but no one is permitted to engage in it without giving the required bond. We thus have the legislature's characterization of the privilege of selling intoxicating liquors as a beverage as one attended with so much danger to the peace of the community that those who would exercise it must first protect the public by giving a bond to keep the peace.

There can, we think, be no doubt that an act which the legislature has, since the earliest days of the State, permitted to be done only under such restrictions as it was thought would preserve the peace, as a condition to the doing of which it has required a bond to keep the peace, and which it has finally prohibited altogether, is necessarily a breach of the peace. We can conceive of no clearer case of a breach of the peace than an act which the legislature has first permitted to be done only under a peace bond and then has prohibited.

Again, the legislature has by the act of 1913 declared the engaging in the sale of intoxicating liquors to be a public nuisance, and we cannot escape the conclusion that it belongs to that class of nuisances

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which this court has always treated as tending to disturb the peace and good order of the community. Long ago it was held that such public nuisances as bawdyhouses "endangers the public peace and good order, by drawing together profligate and disorderly persons" (*Childress v. Mayor & Aldermen*, 3 Sneed, 358), and that "generally any practices tending to disturb the peace and quiet of communities, or corrupt the morals of the people, are indictable as public offenses by the common law." *State v. Graham*, 3 Sneed, 134. And the language last quoted was cited in the very recent case of *Graham v. State*, 134 Tenn., 285, 183 S. W., 983, in support of the holding that the conducting of moving picture shows on Sunday was a public nuisance and an indictable offense. In the latter case, replying to the contention that it was not shown that the public had been disturbed, the court, through Mr. Justice Buchanan, said:

"The proof in the present case makes it clear that the picture-show business of the plaintiff in error was conducted by him on successive Sundays, to the observance of passers-by in the matter of seeing the large crowds going in and out of the show, and the show was located on Market street, a leading thoroughfare of the city of Chattanooga."

Clearly, open saloons, at least when conducted in violation of law, in the same way as bawdyhouses, "endanger the public peace and good order by drawing together profligate and disorderly persons." And certainly, if the peace and quiet of the community

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is disturbed by seeing crowds going in and out of picture shows on Sunday, less cannot be said of lawless saloons along public streets. On all days except Sunday, picture shows are lawful and the passing in and out of them of orderly crowds has no tendency to disturb peace and tranquility. A different rule applies on Sunday, because the law secures to the public a higher degree of peace and quiet on that day than on other days. The principle is that that is a disturbance of the peace which interferes with the degree of peace and quiet which the law contemplates shall prevail at a particular time and place; hence the well-recognized rule that what may not be a breach of the peace at one time and place may very well be such a breach at another time and place. *Delk v. Commonwealth*, 166 Ky., 39, 178 S. W., 1129, L. R. A., 1916B, 1117. The constant violation of the Sunday laws, by acts entirely lawful and orderly on other days, disturbs the peace and tranquility of the community because it is a flaunting in the face of the public of a disregard for the laws of the land and the rules of organized government. The open violations of laws intended to preserve peace and good order necessarily breed in the public mind a feeling of insecurity, and thus disturb the peace and tranquility of the community. When we apply these principles to an open saloon, at a place where it is unlawful to sell liquor at any time, the conclusion is obvious. Such a place is a constant disturber of peace and good order. Nor are we without high authority

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from other States for this conclusion. The Supreme Court of Georgia has said:

"A place where intoxicating liquors are sold in violation of law is a menace to the peace, good order, and happiness of any community, and legislation declaring such a place to be a public nuisance is wise and salutary." *Legg v. Anderson*, 116 Ga., 401, 42 S. E., 720. See, also, *State v. Tabler*, 34 Ind. App., 393, 72 N. E., 1039, 107 Am. St. Rep., 256.

It is said, however, that the act declaring a saloon a nuisance provided the method by which such nuisances should be abated, and that the sheriff is not authorized to institute proceedings for that purpose. But the remedy provided is merely cumulative and does not abrogate any other remedy. It is rather to be used when, through the neglect of officials or for other reasons, the law is not being enforced in the ordinary way. The sheriff's duties are therefore the same that they were before the passage of that act. And the declaration of the act that the conducting of a saloon is a nuisance was nothing more than a restatement of what was already the law. Ever since the sale of intoxicating liquors as a beverage has been unlawful, the open saloon has been a public nuisance of that class which disturbs the public peace.

Another line of authorities leads to the same conclusion. There can, we think, be no disagreement with the statement that the keeping of a disorderly house is a breach of the peace. The accepted definition of a disorderly house is, "Any place where illegal

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practices are habitually carried on is a disorderly house." 2 Words and Phrases (Second Series) 76, citing numerous cases. These authorities establish the rule that a place in which liquors are sold in violation of either prohibitory or regulatory statutes is a disorderly house. And, as we have seen, when saloons were permitted under the law, our own legislature regarded them as so likely to be disorderly houses that every applicant for license was required to give bond to keep a peaceable and orderly house. We entertain no doubt, therefore, that in Tennessee a saloon open, equipped, and ready for business is a threat to breach the peace if it is not in fact, itself a breach of the peace.

Whatever may be thought of a single sale of liquor as a breach of the peace, there can be no doubt that the running of an open saloon in defiance of a law is a nuisance of the class that disturbs public order, and that such a place is a disorderly house. A bawdyhouse, as we have seen, is a menace to peace and good order, and therefore a breach of the peace. And counsel for defendant themselves put the unlawful sales of liquor in the same class by coupling them with "the kindred and concomitant offenses of gambling and keeping bawdyhouses."

The argument is now made, however, that violence, actual or threatened, is a necessary ingredient of a breach of the peace, and several authorities are pressed upon our attention. If it is meant by this that the act complained of must either itself be vio-

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lent, or of such a nature as that its tendency is to provoke or incite or lead others to violence or turbulence of some kind, the contention is correct as to those breaches of the peace which invade the security and protection of individuals. But the insistence seems to be that no act can be a breach of the peace which has not in itself some element of violence. And to this we cannot agree. Such a holding would exclude the possibility of a breach of the peace by the use of words, no matter how certain it is that such words will provoke violence, and many other acts universally recognized as breaches of the peace. Replying to just such a contention, it has been said:

“Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens, but of public morals, without the commission of the offense. The good sense and morality of the law forbid such a construction.” *Davis v. Burgess*, 54 Mich., 517, 20 N. W., 542 (52 Am. Rep., 828).

Counsel quote from 4 Am. & Eng. Enc. p. 902, “Actual or threatened violence is an essential element of a breach of the peace.” But this must be read in connection with the statement on the next page, “at any rate, various acts having a tendency to produce a breach of the peace are themselves breaches of the peace.” And in a note to the portion of the text quoted by counsel it is said: “Actual personal vio-

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lence, is not an essential element in the offense of a breach of the peace;" and *Davis v. Burgess*, 54 Mich., 517, 20 N. W., 542, 52 Am. Rep., 828, is cited. Taken together, these quotations mean no more than that, while the author thinks violence an essential element of the offense, the necessary violence is present either when the act done is itself violent, or when, though not violent, it is of such a nature as to tend to result in or provoke violent acts, and thus threatens violence. This is manifest when we examine the two cases cited in support of the text quoted by counsel. Both cases expressly decide that the act itself need not be violent, but, if it is likely to result in violence, it is a disturbance of the peace. Thus in one of them (*State v. Warner*, 34 Conn., 276) the court said:

"It cannot be denied, and is not denied on the part of the accused, that his language was sufficiently scurrilous, abusive, and indecent, and calculated to stir up and provoke contention and strife, and so far to disturb the peace."

The other case is *Ware v. Branch*, 75 Mich., 496, 42 N. W., 1000, which was a prosecution for a breach of the peace, and it was said:

"It is not necessary that the peace be actually broken to lay the foundation to such a proceeding. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required."

Counsel also refer to 8 Ruling Case Law, p. 285, where it is said:

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“Breaches of the peace generally manifest themselves by some outward, visible, audible, or violent demonstration, not from quiet, orderly, and peaceable acts secretly done, though such acts may be *mala prohibita*. Hence the carrying of arms in a quiet, peaceable, and orderly manner, concealed on or about the person, is not a breach of the peace. Neither does such an act, of itself, tend to a breach of the peace.”

The language quoted is taken from *Roberson v. State*, 43 Fla., 156, 29 South., 535, 52 L. R. A., 751, and reference is made to *Judy v. Lashley*, 50 W. Va., 628, 41 S. E., 197, 57 L. R. A., 413. And these two cases do so hold. There is, of course, force in the argument that that cannot be a breach of the peace which is done secretly and is known to no one except the offender. As long as he merely conceals weapons about his person, no one can be actually disturbed by his act. This is true, not because the act itself lacks violence, but because it is secret, and because one's peace cannot be disturbed by that of which he has no knowledge. But the case is very different when an unlawful act is done openly, and is of such a nature as, in the natural course of events, it is calculated to lead to disturbances of peace and good order. So whether we would hold the carrying of concealed weapons a breach of the peace or not, these cases are clearly not in point. Moreover, the statement quoted immediately follows a statement of the law applicable to breaches of the peace in almost

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the exact language we have quoted from *Davis v. Burgess*. Nor is our own case of *Hurd v. State*, 119 Tenn., 584, 108 S. W., 1064, in point. In that case there was no effort to justify the attempted arrest upon the ground that Hurd was carrying a pistol. The attempt was to arrest for an assault committed, but not in the presence of the officer.

But counsel say that in Massachusetts and Kentucky it has been directly decided that the unlawful sale of liquor is not a breach of the peace. *McLennon v. Richardson*, 15 Gray (Mass.), 74, 77 Am. Dec., 353, it is said, is authority for this contention. We do not think so. The question in that case was whether an officer had the right to break open the doors of a shop in which, it was alleged, the proprietor sold intoxicating liquors contrary to law, and was at the time engaged in selling and drinking intoxicating liquors and in gaming, and to arrest, without a warrant, those found present. The court held that he did not, but called the attention to the fact that it was not alleged that, at the time, there was any noise or disorderly drinking going on in the shop. It was thus made plain that the officer acted merely upon suspicion or information received from others. There was therefore no offense either committed or threatened in his presence. And an officer has no more right to arrest on suspicion or information, without a warrant, for a breach of the peace than for any other offense. Hence there was no occasion to discuss, and the court did not discuss the question as to what constitutes a breach of the peace.

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Besides, it must be remembered that we have not held that an officer may break open doors and force an entrance into any place upon suspecting or being informed that a breach of the peace will then be committed or threatened in his presence.

The Kentucky case referred to is *Cornett v. Commonwealth*, 78 S. W., 858. But that case decides nothing except that the unlawful sale of liquor is not a breach of the peace to prevent which one could, under the law of Kentucky, be required to give bond to keep the peace. And this is exactly what we held under the Tennessee statutes. By the statute of Kentucky (Cr. Code Prac. sections 382, 391), such a bond can be required only to prevent an offense against the person or property of another, or a felony or an act of such violent character as to endanger human life. In holding invalid a bond which undertook to bind the defendant not to violate the liquor laws, the court said:

“Under these provisions, it has been held that a conviction of the defendant of an offense not amounting to a felony, and not involving a breach of the peace, is not a breach of the bond.”

But this must be read in view of the case before the court. So read, it only means that the unlawful sale of liquor was not an offense against the person or property of another, or a felony, or an act of such violent character as to endanger human life, and hence did not belong to that class of breaches of the peace to prevent which the statute authorized a bond

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to be taken. We are the more ready to put this construction upon the language quoted because that court, in later cases, is clearly committed to the rule that violence is not an essential element of a breach of the peace. The case of *Delk v. Commonwealth*, 166 Ky., 39, 178 S. W., 1129, L. R. A., 1916B, 1117, holds that indecent and obscene language used in the pulpit by a preacher is a breach of the peace, and, after a most comprehensive review of the authorities, concludes that actual violence is not an essential element of the offense, and that "not only all violations of the public peace or order, but acts tending to the disturbance thereof," are breaches of the peace. To the same effect are 5 Cyc., p. 1024, Bishop's New Criminal Law, vol. 1, section 539, and Roberson's Criminal Law, vol. 2, section 581, and 8 Ruling Case Law, section 305.

This brings us to the case of *Robinson v. Miner*, 68 Mich., 549, 37 N. W., 21, the only case to which our attention has been called in which there is, in our opinion, a direct holding that the unlawful sale of liquor is not a breach of the peace. And in that case the court was divided on the question. The constitutionality of a statute of Michigan regulating the liquor traffic was involved (Laws 1887, No. 313). All of the judges agreed that some of its provisions were invalid. They disagreed, however, as to others. One of the sections (section 17) about which they differed was that providing that all places, excepting drug stores, where liquors were sold, should be closed on

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certain days and during certain hours on all other days; that the officers should close all places found open at such times; that persons violating these provisions should be deemed guilty of a breach of the peace and arrested without process. The majority opinion held the provisions allowing the officers to close the places and make arrests without process invalid, saying:

“Under our system we have repeatedly decided, in accordance with constitutional principles as construed everywhere, that no arrest can be made without warrant except in cases of felony, or in breaches of the peace committed in the presence of the arresting officer. This exception, in cases of breaches of the peace, has only been allowed by reason of the immediate danger to the safety of the community against crimes of violence, and it was confined, even in such cases, to instances where the violence was committed in the presence of the officer. There are not many such cases. The common and statute law provide for very few specified breaches of the peace, and there are none that are not specified. An indictment charging a person as a peace breaker, and not with any specified crime, would be good for nothing. Assaults and riotous conduct make up the largest part of the list. But there can be no breach of the peace within the meaning of the law that does not embrace some sort of violent as well as dangerous conduct. The manifest purpose of this statute is to bring certain

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things that are not breaches of the peace within that denomination to avoid the necessity of a warrant. But, as already suggested, the Constitution cannot be so evaded. The cases covered by the statute present some peculiar features. No doubt keeping open places of sale late in the evening may lead to breaches of the peace, and, when they actually occur in an officer's presence, arrest may be made for that."

In the face of the authorities we have cited, we cannot assent to the proposition that actual violence is necessary to constitute a breach of the peace. And this is the premise upon which the opinion is grounded, and without which both its reasoning and its conclusion are unsound. Nor can we agree that, if there is now a known list of breaches of the peace provided by "the common and statute law," that list cannot be added to by further legislative acts. If there are now offenses, which by "statute law" are breaches of the peace, and for which arrests may be made without a warrant, we perceive no reason why future statute law may not put other offenses in the same category. Moreover, the opinion quoted wholly ignores what, as we have seen, practically all the authorities hold, that an unlawful act which tends to produce or bring about a breach of the peace or to disturb good order is itself a breach of the peace. Otherwise the statement that "no doubt the keeping open places of sale late in the evening may lead to breaches of the peace," would have led to the conclusion that such unlawful keeping open was a breach

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of the peace even without the aid of a statute so declaring.

We are clearly of the opinion that much the better reasoning and the sounder conclusion are to be found in the opinion of Chief Justice Sherwood in the same case. He held the provisions in question valid, but at the same time, as we think, fully recognized every constitutional right that belongs to the citizen. In addition to the provisions mentioned, there were also provisions authorizing officers to close such places if certain requirements as to bond, taxes, and other things had not been complied with. Speaking of these, the Chief Justice said:

“Neither do I think it competent, under our Constitution, for the legislature to authorize a sheriff, marshal, constable, or police officer to close up a man’s business at a time and place where and when he is allowed, under the law, to carry on such business upon complying with certain precedent conditions, when they have been performed, because such officer thinks he has good reason to believe that the dealer has been or is carrying on the business unlawfully, or has incurred a penalty or forfeiture in the manner he is carrying it on, as is permitted under section 7 of this act. A lawful business can only be interfered with, or a person’s property taken from him or destroyed, after the owner has been served with proper process, and he has had his day in court, and been allowed the benefit and advantages of due process of law, and judgment of condemnation has passed against

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him. It is then, and not till then, the ministerial officer can act, and such action must always be confined to the execution of the judgment and mandate of the court. The protection the law gives to the business and property of the citizen is not left to the discretion of a sheriff, a marshal, or a policeman, but to the law of the land, with courts, and officers under their direction to execute it. Of this protection to private property no owner can be lawfully deprived for a single moment."

But after quoting section 17, which contained the provisions first referred to above, he said:

"This section prohibits the business being done at the times and in the places named, or the places being kept open, and a violation of the law in these respects is declared to be a breach of the peace, and the offense is punished accordingly. . . . The offense, too, is one that only needs to be seen to be detected. . . . If . . . the officer is not permitted to close the doors of places of this sort, where and when it is forbidden to open them, or to carry on the business, and the offense is a breach of the peace, under such circumstances it is very clear that the community and society would be deprived of the most beneficial results intended by the legislation. To close the doors of saloons opened during the hours specified in this section is not, as is contended, destroying a man's lawful business, but to prevent him from committing a breach of the peace by doing an unlawful act, one forbidden and made criminal by law. I think the

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legislature may well authorize the officer to close the door of the saloon under such circumstances. I think this power is included in the power to prohibit, which has long since been adjudicated in this State to exist. I see nothing in this section unconstitutional or objectionable, nor anything more authorized than a reasonable exercise of the police power of the State will permit. . . . There is no doubt that, under the law as established by this court, it is entirely competent for an officer to make arrests without warrant of a person who is committing a breach of the peace in his presence, or is about to commit the same. Such was the rule at common law, and in my judgment it is good common sense. . . . It is the common knowledge of mankind that frequent quarrels, violence, and crime are induced by the excessive use of intoxicating liquor in places where it is kept and sold. And it is impossible to say that, when such places are kept open in the nighttime until after peaceful citizens have retired to rest, it is not a breach of the peace, in fact, and is no less such when made so by law; and when the offense is observed by those charged with the duty of maintaining the peace and enforcing the law, and who may serve process, I have no doubt of their power to make the arrest of the offender without process, and I cannot therefore hold the seventeenth section of the act objectionable in that regard."

We think the clear distinction thus drawn between the protection which the law gives to one and his

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property while engaged in a lawful business and the power which officers of the law may exercise toward him and his property to prevent him from using that property to breach the peace by committing an unlawful act is entirely sound. We would not detract, by one word, from the security which the Constitution guaranties to every man in his person and property. But when a man embarks himself and his property in the conduct of a business which it is unlawful to conduct, both become subject to such force as may be necessary to prevent his carrying out his unlawful purpose. The Constitution gives him no right to violate and defy the law, and when he has been prevented from doing that which is unlawful he has been denied no constitutional right. The business of selling intoxicating liquors as a beverage has been outlawed in Tennessee. He who engages in it makes himself subject to the penalties of the law just as any other lawbreaker. He cannot use his property in such business and expect it to be protected by the law with the same sacredness that property held and used for lawful purposes is protected. The majority opinion in the case referred to is the only case we have seen which we regard as deciding that the unlawful sale of liquor is not a breach of the peace. But believing that it is based on the fundamental error that actual violence is necessary to such an offense, and that it is therefore out of line with the overwhelming weight of authority, we find ourselves unable to follow it or adopt its conclusions. More-

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over, we do not think this majority opinion can be reconciled with the later ruling of the same court in *Ware v. Branch*, which we have already quoted. And in the still later case of *Scougale v. Sweet*, 124 Mich., 311, 82 N. W., 1061, the question was whether the playing of baseball on Sunday, which, by a statute similar to our Sunday statute, was made unlawful under a small penalty, but was not expressly declared to be a breach of the peace, could be held to be a breach of the peace. After a careful examination of the authorities, the court accepted the definition adopted by this court in *Galvin v. State*, supra, and said:

“Where the statute prohibited the arrest of any person on Sunday, except in cases of treason, felony, and breaches of the peace, a ball game upon Sunday was held to be a breach of the peace. *In re (Carroll)*, 12 Wkly. Law Bul. (Ohio), 9. Under our statute, and under the authorities referred to, this game of baseball was a breach of the peace.”

Surely it cannot be said that a saloon, at a place where the law prohibits the sale of intoxicating liquors, is less unjustifiable or less unlawful than a game of ball on Sunday, and undeniably it tends with no less directness to break the peace. It is true that in *Yerkes v. Smith*, 157 Mich., 557, 122 N. W., 223, the majority opinion in *Robinson v. Miner* was quoted with approval. But *Scougale v. Sweet* was also approved. The holding was that a game of baseball on Sunday is not necessarily a breach of the peace, though it may be and is when played in a public

place and attended by a crowd assembled unlawfully and tumultuously so as to create disorder. This conclusion was reached because the statute did not make the playing of such a game an indictable misdemeanor, but only made it unlawful and subjected the offender to a penalty. For this reason it was said that, to authorize an officer to make an arrest, there must be some overt act of violence or disorder. This is far from a holding that an act which the legislature, for the purpose of preserving peace and good order, declares to be a misdemeanor, is not a breach of the peace.

True our prohibitory statutes do not, in terms, declare the unlawful sales of liquor to be breaches of the peace. But, ever since it was first found necessary to regulate the liquor business, this court has consistently held the statutes and ordinances providing such regulations to be peace measures; that is, measures adopted for the purpose of preserving peace and good order. At the same time it was declared, at least 50 years ago, in accord with practically all the authorities, that any unlawful act which disturbs or tends to disturb peace and good order is a breach of the peace. Certainly no strained or unreasonable construction is required to say that the violation of the law which the legislature found it necessary to enact in order to preserve peace and good order disturbs or tends to disturb peace and good order. And when, after this court had held these regulations to be for the preservation of peace and order, the legislature

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deemed it necessary to entirely prohibit, by law, the business which it had previously permitted only under a bond to keep the peace, it cannot be doubted that the purpose of the latter law was the same, and that offenses under it must be placed in the same category.

In re Kellam, 55 Kan., 700, 41 Pac., 960, is pressed upon our attention. But that case is not in conflict with anything we have decided. It merely holds invalid an act which undertook to authorize officers to make an arrest, without a warrant, not only upon seeing an offense committed, but also "upon reasonable suspicion that an offense has been committed." We have not, however, held that an arrest, without a warrant, can ever be rightfully made on suspicion or on information received from others. On the contrary, we have held exactly the opposite, saying distinctly that, to authorize an arrest for a misdemeanor not committed in the presence of an officer, a warrant is always necessary. In fact, we have not held that it was the duty of the defendant to do anything on suspicion or information except to go to the places which he suspected or had reason to believe were being run as saloons, and to observe what any customer could observe, and then to take only such action as would be justified by what he saw.

Counsel argue that it cannot be said that the unlawful sale of liquor is a breach of the peace because, they say, a proper construction of the statutes excludes such a conclusion. The insistence is that be-

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cause the legislature has limited the right of the sheriff to arrest and require security to keep the peace to cases in which the accused is armed for the purpose of committing certain offenses, and has provided for such security in no other cases except upon the complaint, before a magistrate, of one whose person or property is threatened, an intention has been expressed that nothing else shall be considered breaches of the peace. We do not agree to this. Rather do we think the legislature, recognizing the great number and variety of acts which may constitute that offense, did not deem it necessary to the public peace that, in all cases, security should be required. Those offenses which were deemed to be most seriously menacing in their nature were selected, and as to them the sheriff was required to take steps to place the offenders under bond. In addition, a method was provided by which one whose person or property was threatened could himself take steps to that end. All other breaches of the peace were deemed sufficiently guarded against by requiring the sheriff to prevent and suppress them, and authorizing him to make arrests, without warrants, when they are threatened in his presence. Moreover, when the business of selling liquor was lawful, it was, as we have seen, only lawful after a bond had been given to keep the peace. Hence, even if counsel were right in the contention that in Tennessee the only breaches of the peace are those things as to which the legislature has protected the public by providing means of requiring a bond

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to keep the peace, the conducting of a saloon would come clearly within the rule. It is, in fact, conspicuously within the rule; for it furnishes, we believe, the only example of requiring a peace bond without some sort of judicial proceeding.

Counsel complain that our opinion leaves them in doubt as to what the sheriff should do after arresting a man for a threatened sale of liquor. But if it is bornè in mind that such arrests are preventive rather than punitive measures, we think there can be no difficulty on that score. Circumstances can be fancied or imagined under which the performance of any of the duties devolving on the sheriff may become embarrassing and irksome. But practically there is no serious trouble. We have held that the duty of the officer to make these preventive arrests arises only when he finds one under such circumstances as amount to a threat to sell liquor unlawfully. We have not and cannot undertake to set out all the circumstances which will amount to such a threat. We have, however, used a saloon equipped, open, and ready for business as an example, and held that it was the duty of the officer to arrest the person in charge for the purpose of preventing the threatened sales of liquor. We do not mean to say that there are not other circumstances which would justify such arrests. We selected open saloons for an illustration because the record showed that they existed and ought to have been dealt with by the defendant. We have not held that such arrests should be followed by confining the

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offender in jail. We said in the course of argument that the Alabama court had held that there might be circumstances under which a person arrested to prevent a breach of the peace might be rightfully confined in jail. But this was said merely to illustrate the point that such, and only such, force is justified as is reasonably necessary to prevent the threatened offense. We can well imagine circumstances under which, in times of great excitement, such imprisonment might be the only practicable means of preventing great disorder and turbulence. But we think it can rarely, if ever, be necessary to prevent threatened sales of liquor, and we do not now hold that it can ever be justified in such cases. The duty of the sheriff, when he has seen no sales made, but makes an arrest to prevent sales threatened in his presence, is to prevent the sales which the offender is then ready and equipped and threatening to make. When this is accomplished, his duty for that occasion is ended. He may do this by removing the liquors from the place. The proprietor will then not be equipped to sell and the sales threatened in the presence of the officer will have been prevented, and there will be no further occasion to detain the person arrested. Or he may close the place, and thus prevent the sales, and then let the person arrested go free. We said in our former opinion that he will have the right to close the place and keep it closed until the purpose to conduct it as a saloon is abandoned. This perhaps does not quite accurately express what we meant to say.

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He should keep it closed until the danger of the sales then threatened has passed. This will be accomplished when the liquors have been removed and the necessity of keeping the place closed will no longer exist and that particular incident will be ended. In other words, he must do what is necessary to prevent the sales then threatened, and leave future sales and future threats to be dealt with as they arise. In practice, a few such arrests will effectually put an end to open saloons, and the same good judgment which is necessary to the discharge of his other duties will enable him to perform these duties without serious difficulty.

These are the things which it is the duty of a sheriff to do to prevent violations of law. They involve the exercise of the undoubted power of the government to prevent unlawful acts as well as to punish for offenses committed. Speaking of this power and the wisdom of its use, the Supreme Court of the United States has said:

“Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense as a crime after it has been committed.” *Eilenbecker v. District Court*, 134 U. S., 31, 10 Sup. Ct., 424, 33 L. Ed., 801.

But it seems to be argued by counsel that it is a serious invasion of the rights of citizens to permit the sheriff, without process, to seize liquors or close places of business for the purpose of preventing breaches of the peace. But if, for that purpose, a

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man may be arrested, and thus deprived of his liberty, he certainly cannot complain because he is deprived of a mere property right which he is using as a means of breaching the peace. That, for the purpose of preventing a public offense, an officer may seize and detain the things about to be used in the commission of the offense, is no new doctrine. The rule is well stated in a headnote to *Spalding v. Preston*, 21 Vt., 9, 50 Am. Dec., 68, which fairly interprets the decision in that case as follows:

“The officers of government have authority, derived from the general rights of the government, without any statute whatever upon the subject, to exercise all necessary force for the prevention of crime, either by the arrest of individuals, or by the seizure and detention of the instruments for committing crime.”

More or less to the same effect are *Shanley v. Wells*, 71 Ill., 78; *O'Connor v. Bucklin*, 59 N. H., 589; *Ross v. Leggett*, 61 Mich., 445, 28 N. W., 695, 1 Am. St. Rep., 608; *Ex parte Morrill* (C. C.), 35 Fed. 261.

In a supplemental brief, counsel for defendant have quoted from *Quinn v. Heisel*, 40 Mich., 578, as follows:

“We are of opinion that a threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts were such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made coupled with some overt act

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in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer. The object of permitting an arrest under such circumstances is to prevent a breach of the peace, where the facts show danger of its being immediately committed."

The only thing in this quotation which is not fully in accord with what we have held is the statement that, "to justify such an arrest, the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor." We have not had access to the statutes of Michigan, but the numerous Michigan cases to which our attention has been called make it plain that there is, in that State, no statute like ours, expressly authorizing an arrest for a threatened breach of the peace. Viewed in the light of this fact, the language quoted strongly supports our conclusion in this case. Regarding the right of an officer, by the common law, to make an arrest, without a warrant, as confined to breaches of the peace actually committed in his presence, the court nevertheless recognized his preventive duty to the extent of holding that his duty to interfere begins whenever any act is done which amounts to an attempt to commit the offense. But treating this as a

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correct statement of the common-law rule, our legislature evidently intended to enlarge the preventive duties of the officer when it authorized him to arrest for a threatened breach of the peace. Under the common law, the Michigan court held that an attempt would justify an arrest. Under our statute, a threat is put in the same category.

It is insisted that the sheriff is not the only peace officer, that the judges and others are also conservators of the peace, and that, if the sheriff is onerated with the duties we have held belong to his office, the same duties rest upon these other conservators of the peace. Of course, we are not now called on to define the duties of any officer except a sheriff. But we may remark that, while there are many officers who, by virtue of their offices, are also conservators of the peace, our statutes, in line with the nature of the office from the most ancient times, make the sheriff the chief conservator of the peace in his county. His official character has been shown by the authorities already quoted. We have held that he is charged with the duties described not merely because he is called by the statute a conservator of the peace, but because they have always belonged to his office, and because, in express terms, our statutes make it his duty to suppress and prevent public offenses and breaches of the peace. It is sufficient now to say that not all conservators of the peace are charged with all the duties of the sheriff. The making of an arrest is only one of the things to be done for the pur-

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pose of preserving the peace. Every officer charged with the duty of doing any of these things is, to that extent, a conservator of the peace. But, in order to determine what are his duties, we must look not only to the fact that he is a conservator of the peace, but to the particular duties which the law attaches to his office.

It is insisted that the case of *McCrowell v. Bristol*, 5 Lea, 685, is authority against the right of an officer to close a saloon. But that case was decided when the saloon business was lawful in Tennessee, and all that was held was that municipal authorities could not, without judicial proceedings, declare a saloon a nuisance on account of the manner in which it was conducted, and abate it. But now the saloon business is unlawful. And it has never been the law in Tennessee that officers could not stop any public offense committed or about to be committed in their presence.

It is finally insisted that no willful neglect of duty has been shown. On this question defendant is precluded by his admission that he did nothing in Memphis except to serve process. He may not have understood some of his duties as we have defined them. We have not, however, removed him merely because he failed to make arrests for threatened violations of the law. In view of the advice given him by counsel, and of the fact that there had been no previous decision of the question, if he had made an honest effort to suppress and prevent violations of the law by doing the other things we have held it was his duty

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to do, we would probably hold that his failure in this respect was not a willful neglect of duty, and that he should not be removed. But the record shows and he admits that he did nothing but serve such process as was placed in his hands. And any man of intelligence, who, as sheriff, under the conditions disclosed by this record, did nothing but serve process, must be deemed to have willfully failed and neglected to perform the duties of his office.

There is nothing in what we have decided to justify the excited statement of counsel that there is involved a "controversy between the people and their liberties, and a doctrine which would seriously oppress the one and impair the other." We have only applied to the class of offenses under consideration the same rule that has from time immemorial been applied to other offenses of no more gravity and fraught with no more danger to the public. We have merely said that it is the duty of the faithful officer to interfere to prevent offenses of this kind, just as he has always interfered when similar offenses were threatened in his presence. The rules we have laid down authorize the interference with a citizen only when he is about to do that which the law denounces. And we refuse to recognize as one of the liberties guaranteed by any government to its citizens the privilege of violating its laws. Nor is there any element of oppression of the people in making effective the mandate of their own laws that, for the good of the public, they shall not do certain things.

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After examining the questions involved with the care merited by their importance and the earnestness and ability of counsel, we are satisfied with the conclusions heretofore announced, and the petition to rehear will be dismissed.

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1. *Other action pending. Ground for demurrer.*
To recover land conveyed in violation of a restraint on alienation, pendency of a prior suit on the same matter would not be ground of demurrer, but for motion to elect. *Travis v. Sitz*, 156.
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ACTIONS, RIGHT OF CAUSE.

1. *Railroads. Injuries to persons on tracks. Actions. Statute.*
Shannon's Code, section 157, subd. 4, providing that every railroad company shall keep the engineer, fireman, or some other person on the locomotive always on the lookout ahead, and when any person appears upon the railroad, the alarm whistle shall be sounded, the brakes put on, and every possible means employed to stop the train and prevent an accident, does not apply where a trespasser, walking along the railroad right of way, was struck by a piece of timber which became loose and projected from a lumber car; for there was nothing to show the trespasser's danger to the engineer, who did not know of projecting timber. *Preslar v. Railroad*, 42.
2. *Railroads. Injuries to persons on tracks. Actions. Res ipsa loquitur.*
Where a trespasser on a railroad right of way was struck by a piece of timber which projected from a lumber car and it did not appear how the lumber was loaded or whether the timber was caused to project by reason of negligence of the railroad company and there was no showing as to how long it had projected, negligence on the part of the railroad company cannot be based on the doctrine of *res ipsa loquitur*. *Ib.*
3. *Intoxicating liquors. Illegality. Right of action for price.*
Mere knowledge on the part of the seller of intoxicants that the buyer intends illegally to resell the liquors will not render the contract void, so as to bar the seller's action for the purchase price, though if the seller participates in or contributes to the purchaser's intention to sell illegally, or does any act to facilitate or further the design to transgress the law, or has an interest therein, the right to recover the price is lost. *Jones & Co. v. Wilkins*, 146.
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ACTIONS—ACTS CITED AND CONSTRUED.

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consignee, marked merely with his initials, so that the public would not know to whom it was to be delivered, such seller could not recover the price, having aided the buyer's design to transgress the law and circumvented the legislature's object in passing Acts (Ex. Sess.) 1913, chapter 1, requiring common carriers to cause all consignees of liquor to sign, before delivery, an affidavit setting out his name, etc. *Ib.*

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ADVERSE POSSESSION.

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APPEAL AND ERROR.

1. *Judgment. Notwithstanding verdict. Party entitled to move.*
Where a case had been submitted to the jury and judgment entered on a verdict for the plaintiff, a judgment *non obstante verdicto* for the defendant rendered by the trial judge, at the request of the defendant, was error. *Neill v. Insurance Co.*, 28.
2. *Costs. On appeal. Expense of bill of exceptions. Unnecessary matter. "Full costs."*
Where a successful appellant in an action at law, by violating supreme court rule 2 (126 Tenn. 716, 160 S. W. vii), requiring bills of exception to state testimony in narrative and concise form, increased materially the size of the transcript, he should pay one-half of the appeal costs, notwithstanding the rule that in actions at law the successful party is entitled to recover full costs, since "full costs" do not include costs so added. *Perkins v. Brown*, 140.
3. *Scope of review. Intermediate court amount of damages.*
Where the trial court and the court of civil appeals concur as to the amount of damages to a property owner by destruction of his easement of access by elevation of railway tracks across an adjacent street, and the evidence is conflicting, the supreme court will treat such concurrent finding as conclusive. *Railroad Co. v. Moriarity*, 446.
4. *Harmless error. Instruction.*
In an action against a railway for injuries, where, under all the evidence, there was no material issue of fact for the jury to determine on the question of defendant's negligence, error in charging the doctrine of *res ipsa loquitur* was harmless. *Memphis St. Ry. Co. v. Carell*, 462.
5. *Criminal law. Reversal. Failure to instruct. Statute.*
Where refusal to give proper instructions does not affect the result the verdict being fully in accord with the merits of the case, the case must be affirmed, under Acts 1911, ch. 32, providing that no verdict or judgment shall be set aside or any criminal cause for error in the charge, etc., unless in the opinion of the appellate court it affirmatively appears the error has affected the result. *Montgomery v. State*, 577.

ARREST.

1. *Arrest without warrant. "Breach of the peace." Unlawful sale of liquors.*
"Breach of the peace" being a generic term including all violations of public peace or order, includes unlawful sale, actual or threatened, of intoxicating liquors, and the sheriff may arrest without warrant therefor. *State ex rel. v. Reichman*, 653.
2. *Arrest without warrant. Threatened sale of liquors.*
The right of the sheriff to arrest without warrant for threatened unlawful sale of intoxicating liquors and to close the place of business is not unlawful as an arbitrary invasion of property rights,

 ATTACHMENT— ATTORNEY AND CLIENT.

ARREST— Continued.

which are not more sacred than the person, which may be seized to prevent breach of the peace. *Ib.*

3. *Arrest without warrant. Threatened unlawful sale of intoxicating liquors.*

For a misdemeanor committed without his presence, a sheriff cannot arrest without warrant; but, if breach of peace is threatened in his presence, he needs no warrant to arrest to prevent the breach under Shannon's Code, section 6892. *Ib.*

4. *Without warrant. Duties of sheriff.*

While a sheriff need not make a forcible entrance into a suspected residence or place of business to discover violations of the liquor law, he or his deputies should enter open saloons and make arrest if justified by what they see therein. *State v. Reichman*, 685.

See BREACH OF THE PEACE; INTOXICATING LIQUORS.

ATTACHMENT.

1. *Amendment of bill. Effect.*

When one seeking a mechanic's lien failed to make the trustees of a prior mortgage parties, but later brought them in by amendment, such amendment does not under Shannon's Code, section 5237, declaring that the attachment laws shall be liberally construed, and plaintiff shall be permitted to amend any defect of form, destroy an attachment levied against the contractor and owner under the original bill. *Niehaus v. Construction Co.*, 382.

2. *Proceedings. Change in theory of attachment.*

A plaintiff, who has attached a party's effects, both at law and equity, may dismiss his attachment at law and proceed in equity. *Ib.*

ATTORNEY AND CLIENT.

1. *Lien. Issuance of summons.*

Acts 1899, chapter 243, provides by sections 1 and 2 that attorneys of record who begin a suit in a court of record shall have a lien upon plaintiff's right of action from the filing of the suit and that any attorney who is employed to prosecute a suit already brought shall have a lien on plaintiff's right of action from the date of his employment, provided, the record will first be made to show such employment by notice on the rule docket of such court or written memorandum filed with the papers in the case or notice served on defendant. Shannon's Code, sections 4445, 4518, declare that all civil actions in court of record are commenced by summons. Defendant compromise an action by plaintiff before summons was served. *Held*, that until service of summons or some other notice of institution of the suit, plaintiff's counsel had no lien which he could assert against defendant. *Steel Const. Co., v. Walker*, 55.

2. *United States. Powers of congress.*

Congress has the power to determine the conditions upon which the government will consent to be sued, or upon which it will grant pensions or other bounties, or prescribe conditions upon which attorneys will be allowed to represent claimants or litigants before any of the courts of the government, within certain reasonable limitations, if done by general laws applicable to all alike, and in advance of the services rendered in such courts. *Moyers v. Memphis*, 263.

 AUTOMOBILES—BANKRUPTCY.

ATTORNEY AND CLIENT—Continued.

3. *Compensation. Contingent fees. Legality.*

A contract between an attorney and city, by which the attorney is to receive fifty per cent. of the amount collected from the government on a claim arising out of the Civil War, is legal and valid, and not against public policy. *Ib.*

4. *Constitutional law. Powers of congress. Depriving of property.*

Act Cong. March 4, 1915, chapter 140, section 4, 38 Stat. 996, prohibiting and amount in excess of twenty per cent of the amount collected to be paid to the attorney collecting Civil War claims included under the bill, is unconstitutional and invalid, under Const. U. S. Amend. 5, as to attorneys who have performed their services and secured the allowance of claims prior to its enactment, since they have then a vested property right, which cannot be destroyed by arbitrary act of Congress. *Ib.*

AUTOMOBILES.

See INSTRUCTIONS.

BAIL.

Pending appeal. Violation of ordinance.

Defendant convicted in a city court of carrying concealed weapons in violation of city ordinance, being unable to furnish an appeal bond might take the paupers' oath and have his case reviewed by the circuit court, but was not entitled to a discharge from custody pending the appeal, unless he gave a bail bond in a sufficient amount to appear and perform whatever judgment might be rendered by the appellate court. *Deming v. Nichols*, 295.

BANKRUPTCY

1. *Mechanics' liens. Purpose of statute. Construction.*

The intention of the legislature in enacting the mechanic's lien laws was to secure and protect the laborer in his wages, and thereby to promote and encourage improvements, and the act should be given a liberal construction so as to carry out such purpose. *Hotel Co. v. Construction Co.*, 305.

2. *Mechanics' liens. Procedure. Construction.*

While the law is strict in its requirements that the claimant shall make it clearly appear that he has a lien, yet when that appears remedial laws for its enforcement are to be liberally construed. *Ib.*

3. *Mechanics' liens. Discharge in bankruptcy. Statute.*

Under Bankrupt Act, July 1, 1898, chapter 541, section 67, cl. D, 30 Stat. 564 (U. S. Comp. St. 1913, section 9651), providing that liens given or accepted in good faith and for a personal consideration, which have been recorded according to law, if the record thereof is necessary to impart notice, shall not be affected by the act, and section 16 (section 9600), providing that the liability of a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the bankrupt's discharge, there was no intention to impair liens

BANKRUPTCY.

BANKRUPTCY— Continued.

valid under the State laws, but to give the bankrupt personal immunity from his debts, leaving intact all liens existing prior to the bankruptcy in favor of his creditors, so that mechanics' liens upon the property of a hotel company in force more than four months prior to the contractor's adjudication in bankruptcy continued in force as against the property of the hotel company, after the contractor's discharge. *Ib.*

4. *Discharge of contractor. Parties. Judgment against owner.*

The owner filed a bill in chancery against the contractor, the guaranty company, and certain sub-contractors and material-men who had filed liens against the property, and the separate suits of the lien claimants were consolidated therewith, and the owner sought judgment against the contractor and the surety company for the amount of liens established against its property, and a stipulation between the hotel company, the construction company by its trustee in bankruptcy, and the surety company was filed, showing the amount due from the hotel company to the construction company, providing that it should be applied to the discharge of liens for which the hotel company was secondarily liable, without releasing the surety, and the construction company thereafter filed a petition to stay, and later alleged its discharge in bankruptcy as a bar to the lien claims. *Held*, that, as all the parties were before the court, the fact that judgment could not be had against the contractor by reason of his adjudication in bankruptcy did not prevent a foreclosure of the liens against the hotel property, and that, as the trustee in bankruptcy came into court, it was not necessary that the lienholders should be compelled to follow the trustee and the bankrupt back into the bankruptcy court to adjust their claims. *Ib.*

5. *Proof of claim. Action.*

In the case of a bankrupt corporation, the bankruptcy act does not restrain a creditor who has not proved his claim in bankruptcy from prosecuting an action to judgment to enforce his lien upon the property attached or to charge officers or stockholders liable for the debts of the corporation. *Ib.*

6. *Discharge. Liability of sureties.*

Shannon's Code, section 6264, declares that, on dissolution of an injunction to stay proceedings on the judgment for money, decree shall be entered against the claimant and his surety for such sum as the court may order. Sections 4485-4487 declare that, where an instrument is joint and several, suit may be brought against one or any of the obligors, and that the discharge of one does not effect discharge of the other. Complainant, who sought to enjoin execution on a money judgment, filed an injunction bond and, after the injunction was issued, was adjudicated a bankrupt. Bankruptcy Act July 1, 1898, chapter 541, section 16, 30 Stat. 550 (U. S. Comp. St. 1913, section 9600), declares that the liability of a person who is a codebtor with, or guarantor or surety for, a bankrupt, shall not be altered by the discharge of the bankrupt. *Held* that the discharge of complainant, principal in the bond, did not, the injunction being dissolved, discharge the liability of the surety. *Martin Furn. Co. v. Massey*, 338

BANKS AND BANKING.

BANKRUPTCY— Continued.

7. *Composition. Liability of sureties.*

As the release effected by composition of a bankrupt is one affected by operation of law and not mutual consent, the fact that a creditor, whose claim had been enjoined before the debtor was adjudicated a bankrupt, joined in favor of the composition, does not discharge the surety on the debtor's injunction bond. *Ib.*

BANKS AND BANKING.

1. *Cashier. Duties of. "Partnership."*

Where a bank cashier who was also a member of a firm issued a draft to pay a firm obligation embezzling the bank's funds in his capacity as cashier, the bank cannot recover from the payees the amount of the draft on the theory that the cashier was merely paying his own obligation; for the commercial idea is that a partnership is practically an entity separate from the members composing it; this being particularly true as the name of the partnership indicated it was a corporation (citing Words and Phrases, Partnership), *Pemiscot County Bank v. Nat. Bank*, 13.

2. *Contracts. Mutuality. Contract to loan money.*

A bank is liable for breach of a contract to loan money in consideration of the transfer of a deposit, such a contract not being unilateral, the consideration being the agreed transfer of deposit. *Farabee-Treadwell Co. v. Bank & Trust Co.*, 208.

3. *Liability of acts of cashier.*

A bank and its receiver in insolvency are bound by the act of its cashier in issuing drafts and by the admission of value received contained in such drafts, in the absence of proof that the payee had actual or constructive knowledge of the fraud of the cashier or the falsity of such admission. *Pemiscot County Bank v. Wilson-Ward Co.* 426.

4. *Authority of cashier. Drafts drawn by cashier to himself.*

A cashier has no implied authority to draw drafts in his own favor or in favor of a creditor in payment of individual debts, and the payee of such drafts is put on notice of the facts, is not an innocent holder, and may be compelled to account to the bank for the amount. *Ib.*

5. *Liability of bank for wrongful acts of cashier.*

The payee of a draft, knowing that the cashier of the bank of issue was interested in the firm for whose debt the draft issued, and was secondarily liable for such debt, but believing the debtor firm to be solvent, is not charged with notice that the draft was issued through fraud of the cashier or that the bank received no consideration therefor, and such payee cannot be compelled to reimburse the bank. *Ib.*

6. *Liability of bank for wrongful acts of cashier.*

A bank may not hold its officers as worthy of confidence, and yet reap profits from frauds which they are thereby enabled to perpetrate. *Ib.*

BILLS AND NOTES.

BANKS AND BANKING—Continued.

7. *Rights of stockholders. Representation.*

Under the New York statute, authorizing the superintendent of banks to ascertain financial condition and make assessments on stockholders by arbitrary determination, and allowing the corporation ten days to apply for injunction, the doctrine of representation of stockholders by the corporation does not apply, nor does the failure of the corporation to apply for injunction estop the stockholders and make the assessment binding; and the assessment, being arbitrary, will not be enforced in Tennessee. *Van Tuyl v. Carpenter*, 629.

8. *Stockholders' liability. Validity of statutes. Determination. Statutes of other States.*

In suit in Tennessee to collect arbitrary assessments on stock by the New York banking commission, the question is not whether the statute authorizing such assessments is valid, but whether public policy of Tennessee permits such power to vest in a ministerial officer. *Van Tuyl v. Carpenter*, 629.

9. *Insolvency receivers. Actions.*

The right of the New York banking commissioner to recover assessments under New York law in Tennessee depends on the statute, and unless the right to sue in foreign State is given by statute, he cannot sue in such State. *Ib.*

10. *Insolvency receivers. Actions.*

Until judicial determination of amounts needed for liquidation of the corporation, the superintendent of banks, or statutory receiver, though having title to the assets and empowered to sue in a foreign State, cannot bring such suit. *Ib.*

BILLS AND NOTES.

1. *Ratification. Mortgaged security.*

Where defendant, who had put some money in the business of her son-in-law, and must have known of his indebtedness, and that he had made an assignment of his stock of goods, after the execution of a forged note for \$1,000 due January 1, 1912, purporting to be signed by her, executed a mortgage on realty "to secure the payment of one promissory note bearing this date and due January 1, 1912, for \$1,000," she thereby acknowledged the validity of the note and ratified its execution in her name. *Dry Goods v. Hill*, 60.

2. *Forgery. Estoppel. Statute.*

Where defendant by her mortgage of realty to secure a certain described note thereby adopted and ratified the note, although it had been forged, and where after her ratification and the delivery of the mortgage and the note to the mortgagee, the mortgagee released and turned over to her son-in-law a stock of goods which had been previously assigned for the mortgagee's benefit, an estoppel *in pais* arose against the defendant, precluding her from setting up forgery under section 23 of the Negotiable Instruments Act (Laws 1899, chapter 94). *Ib.*

 BOUNDARIES.

BILLS AND NOTES—Continued.

 3. *Negotiability. Certain time. Acceleration clause.*

A series of notes, payable at different times, but all to become due upon default of one are negotiable; the time of payment not being uncertain and contingent within Negotiable Instruments Act (Laws 1899, ch. 94) sec. 1, subsec. 3, and section 4, providing that an instrument is negotiable which is payable, "on or before a fixed or determinable future time specified therein." *White v. Hatcher*, 609.

 4. *Construction. Time of maturity. Acceleration clause.*

Such notes become due prior to their fixed maturities only at the option of a holder, and the holder of earlier notes, upon one of which default is made, can declare due and payable only the notes in his possession. *Ib.*

BOUNDARIES.

 1. *Controlling elements.*

The general rule that resort is, first, to natural objects or landmarks; second, to artificial monuments; third, to lines of adjacent owners; and last, to courses and distances—is not inflexible or absolute. *Pritchard v. Rebori*, 328.

 2. *Controlling elements. Monuments.*

There is no magic in a monument called for so as to make it control invariably, but it controls only when regarded as more certain than course or distance. *Ib.*

 3. *Controlling elements. Adjacent boundary.*

A mere adjacent boundary line would yield more readily to course and distance than an artificial monument. *Ib.*

 4. *Controlling elements.*

The rule that course and distance yield to monuments or adjacent boundary lines is usually applied in fuller force to large boundaries of land in the country, and with less potency in towns or cities. *Ib.*

 5. *Controlling elements.*

In deeds to city property where courses and distances were intended by the parties to control, they will be given that effect. *Ib.*

 6. *Deeds. Construction. Property conveyed.*

The object in all boundary questions is to find as nearly as may be certain evidences of what particular land was meant to be included for conveyance. *Ib.*

 7. *Controlling elements.*

Where a deed to a city lot recited "fourty feet to a right of way," and there was no actual monument marking the right of way, the call for the right of way would yield to distance; the parcel being so small as to be seen at a glance, and the outer limit lacking definiteness to override the distance call, especially where a fence inside the right of way misled the parties to believe it to be the boundary. *Ib.*

 BREACH OF THE PEACE.

BOUNDARIES—Continued.

8. *Evidence. Parol evidence. Intent.*

A grant of land bounded on a street will be referred to the street as built and used, and not as shown on a recorded map or plat; but if the land is conveyed bounded by a highway, parol evidence is admissible to show whether the actual or the surveyed line was intended. *Ib.*

BREACH OF THE PEACE.

1. *Arrest. Arrest without warrant. Threatened unlawful sale of intoxicating liquors.*

While mere possession of intoxicating liquors in any quantity is not unlawful, it is a breach of the peace for one having liquors to prepare for sale thereof, that being a threat to violate the law against sales. *State ex rel. v. Reichman*, 653.

2. *Arrest. Arrest without warrant. Threatened unlawful sale of intoxicating liquors.*

For a misdemeanor committed without his presence, a sheriff cannot arrest without warrant; but, if breach of peace is threatened in his presence, he needs no warrant to arrest to prevent the breach under Shannon's Code, section 6892. *Ib.*

3. *Sheriffs and constables. Breach of duties. Defenses.*

It is no defense for the sheriff's failure to prevent breaches of the peace by unlawful sales of intoxicating liquors, that the State was proceeding against offenders under the Nuisance Act (Laws 1913 [2d Ex. Sess.] chapter 2), or that the criminal court administration was lax and nothing would have been accomplished in the case of arrest. *Ib.*

4. *Elements. "Peace."*

The word "peace," in the phrase "breach of the peace," means the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members; that invisible sense of security which every man feels necessary to his comfort, and for which all governments are instituted. *State v. Reichman*, 686.

5. *Elements. Violation of statute.*

"Breach of the peace," in view of the generally accepted definition, and of constitutional provision that all indictments shall conclude, "against the peace and dignity of the State," includes any violation of any law enacted to preserve peace and good order. *Ib.*

6. *Intoxicating liquors. Offenses. "Disorderly house."*

A saloon run in violation of law is a "disorderly house," which is defined as any place where illegal practices are habitually carried on; and hence a saloon open, equipped, and ready for business is a threat to breach the peace, if not in itself a breach of the peace. Citing Words & Phrases, Second Series, Disorderly House. *Ib.*

7. *Elements. Violence.*

It is not necessary that an act have in itself any element of violence in order to constitute a breach of the peace. *Ib.*

 CARRIERS.

CARRIERS.

1. *Carriage of passengers. Passenger without ticket. Ejection.*

Though a carrier can require a passenger to purchase a ticket before entering a train where it gives reasonable opportunity to do so and may enforce the rule by refusing to permit any one to enter a passenger train without a ticket, one who has in good faith openly entered a passenger car in the usual manner, and who offers to pay his fare, cannot be ejected because he has no ticket. *Allen v. Railroad*, 6.

2. *Injuries by servant. Wanton acts.*

Where an employee of a railway company compelled trespassers stealing a ride to jump from the train when it was passing over a trestle, although they had intended to alight shortly, his act was wanton, and where the trespassers were injured, furnishes ground for an action of damages. *Railroad v. Marlin*, 435.

3. *Carriage of passengers. Sleeping car employees.*

With respect to passengers, employees in charge of a Pullman car are held agents of the railroad company, and are bound to refrain from injuring passengers as well as to protect them, but such agency does not exist with respect to trespassers. *Ib.*

4. *Carriage of passengers. Duty of care.*

A carrier of passengers is bound to exercise the highest degree of care for their safety, but its only duty to a trespasser is to refrain from wilfully injuring him. *Ib.*

5. *Acts of agent. Responsibility of principal.*

The employees of a Pullman car are deemed agents of the railroad company only with their relations to passengers, such employees having no control over the management of the train. Decedent, who had been stealing a ride on the top of a train, climbed down to the platform of a Pullman car shortly before the train reached the station. The Pullman car conductor compelled decedent to jump from the moving train while it was on a high trestle, and from resulting injuries decedent died. There was nothing to show that decedent was about to annoy Pullman passengers or to even enter the car, and the act of the conductor was a purely personal matter of his own. *Held*, that the railroad company was not responsible for the act of the Pullman car conductor, for such person was not its agent or servant. *Ib.*

6. *Carriage of passengers. Degree of care.*

The degree of care imposed on a carrier of passengers, such as a street railway, by law and on grounds of sound public policy, is the exercise of the utmost diligent skill and foresight. *Memphis St. Ry. Co. v. Carell*, 462.

7. *Injuries. Negligence. Question for jury.*

In an action against a street railway for injuries to a passenger, where, under all the evidence, no reasonable difference of opinion can exist as to the negligent character of the acts of defendant's employees at a railroad crossing under the particular

 CLERKS OF COURTS—CODE CITED AND CONSTRUED

CARRIERS— Continued.

circumstances and at a particular time, the act was negligent in law, and there is no issue for the jury on the question of the negligence. *Ib.*

8. *Carriage of passengers. Negligence.*

Where a street railway's conductor in charge of a motor and trailer after walking upon straight railroad tracks gave the signal to the motorman to attempt the crossing, so that, though the motor got over the tracks, the trailer was struck by a train, the street railway was negligent, though the dust and noise of another train, which the motor had stopped to let go by, hindered the conductor's seeing and hearing the approaching train. *Ib.*

9. *Carriage of passengers. Negligence.*

The negligence of a railroad in running a freight over a street railway crossing did not excuse such street railway, whose conductor was negligent in not making sure of the approach of the freight before attempting to cross, from liability to an injured passenger, since the passenger's injuries were the proximate result of the conductor's failure to discharge his duty. *Ib.*

CLERKS OF COURTS.

1. *Appointment. Powers of legislature.*

Priv. Laws 1915, ch. 78, sec. 4, providing that the clerk of the circuit court of Dyer county shall be clerk of the criminal court of such county, does not violate Const. art. 6, sec. 13, requiring that clerks of inferior courts to be elected by the voters every four years. *Hodge v. State*, 525.

2. *Judges. Establishment of offices. Statutes. Validity.*

Priv. Laws 1915, ch. 78, being intended to relieve the circuit court of Dyer county of certain duties, properly provides by sections 4, 12, that the judge of the county court and clerk of the circuit court shall perform the duties of the criminal court established by the act, and it is unnecessary that a new judgeship and clerkship be established. *Ib.*

3. *Judges. Holding two offices. "Lucrative office."*

Priv. Laws 1915, ch. 78, secs. 4, 12, providing that the judge of the county court of Dyer county shall act as judge of the criminal court created by the act, and the clerk of the circuit court as clerk of such criminal court, does not violate Const. art. 2, sec. 26, providing that no person shall hold more than one "lucrative office," since the act expressly provides that there shall be no compensation therefor. *Ib.*

CODE CITED AND CONSTRUED.

§ 5, ch. 22 (1784). Wills. Construction. Estates created. *Scruggs v. Mayberry*, 586.

§§ 3533, 3536, 3569, 3585. Liens. Priorities. *Parker-Harris Co. v. Tate*, 509.

 COMMERCE.

CODE CITED AND CONSTRUED—Continued.

- § 157 (S.). Railroads. Injuries to persons on tracks. Actions. Statute. *Prestar v. Railroad*, 42.
- §§ 452, 6892-6895, 6898, 6899, 6900, 6978, 6997. (S.). Sheriffs and Constables. Powers and duties. *State ex rel. v. Reichman*, 653.
- § 993, subsec. 2 (S.). Intoxicating liquors. Offenses. Statutory provision. *State v. Reichman*, 685.
- §§ 1866, 1867, (S.). Eminent domain. Nature. Acts constituting. Appropriation. *Lea v. Railroad*, 564.
- § 3672 (S.). Curtesy. Wife's separate estate. Construction of deed. *Travis v. Sitz*, 156.
- § 3673 (S.). Wills. Construction. Estates created. *Scruggs v. Mayberry*, 586.
- § 3794 (S.). Exemptions. Statutes. Construction. *Prater v. Reichman*, 485.
- §§ 4234, 4235 (S.). Husband and wife. Wife's separate estate. Statute. *Travis v. Sitz*, 156.
- §§ 4445, 4518 (S.). Attorney and client. Lien. Issuance of summons. *Steel Const. Co. v. Walker*, 55.
- § 4456 (S.). Mines and minerals. Title-adverse possession. By possession of surface. *Northcut v. Church*, 541.
- § 4468 (S.). Action. Contract or tort. Action on contract. *Farabee-Treadwell Co. v. Bank & Trust Co.*, 208.
- § 4495 (S.). Mechanics' liens. Pleading. Amendment. Limitations. *Niehau v. Construction Co.*, 382.
- §§ 5414, 5422 (S.). Trusts. Removal of trustee. Statute. *Maydwell v. Maydwell*, 1.
- §§ 5595, 7199, 7201, 7028, 7232, 7250 (S.). Pardon. Time of granting. "Conviction." *State ex rel. Barnes v. Garrett*, 617.
- §§ 5596, 5597 (S.). Witnesses. Privilege. Husband and wife. *McCormick v. State*, 218.
- § 5907 (S.). Bail. Pending appeal. Violation of ordinance. *Deming v. Nichols*, 295.
- § 6257 (S.). Injunction. Bonds. Enforcement. *Martin Furn. Co. v. Massey*, 338.
- § 6264 (S.). Bankruptcy. Discharge. Liability of sureties. *Ib.*
- § 6783 (S.). Commerce. "Interstate commerce." Engagements in by liquor dealer. Statute. *Hiller v. Crenshaw*, 151.
- § 6892 (S.). Arrest. Arrest without warrant. Threatened unlawful sale of intoxicating liquors. *State ex rel. v. Reichman*, 653.

 COMMERCE.

1. *Interstate commerce. Validity of contract. Complaint.*

A complaint for breach of contract by an interstate carrier for an expedited shipment which does not show that the carrier had no published tariff covering such shipments, does not show that the contract was illegal under the Interstate Commerce Act of Feb. 4, 1887, chapter 104, section 3, 24 Stat. 380 (U. S. Comp. St. 1913, section 8565), and the Elkins Act, Feb. 19, 1903, chapter 708, 32 Stat. 847. (U. S. Comp. St. 1913, sections 8597-8599). *Roberts v. Railroad*, 48.

2. *Interstate commerce. Validity of contract.*

In an action for breach of an interstate carrier's contract for an expedited shipment, where it appeared that there was no pub-

 COMPROMISE— CONFLICT OF LAWS.

COMMERCE—Continued.

lished tariff for such shipment, the contract was illegal under the Interstate Commerce Act and the Elkins Act, since it gave an undue advantage to the shipper, and there could be no recovery thereon. *Ib.*

3. "*Interstate commerce.*" *Engagement in by liquor dealer. Statute.*
Under Acts 1909, chapter 479, section 4, subjecting the occupation of-wholesale liquor dealer to a privilege tax, making it a misdemeanor to exercise the privilege without first paying the tax, and section 16, providing that the inhibition of the act shall not apply to any person engaged in interstate commerce, a liquor dealer, who sold to customers out of the State, securing his supply from other dealers in the city, who carried a "borrow and loan" account with such other dealers and in turn supplied them with liquors, thus balancing accounts, but making settlement by cash payment in one case, was doing an intrastate business, and so liable for the tax. *Hiller v. Crenshaw*, 151.

COMPROMISE.

Compromise and settlement. Validity.

The law encourages honest efforts to compromise differences. *Silliman v. Life Ins. Co.* 646.

CONFLICT OF LAWS.

1. *Injunction. Foreign courts. Injunction against proceedings. Relief. Equitable remedies.*

The courts of the forum may restrain a citizen of the State of the forum from prosecuting a suit against a citizen of the same State in the foreign State. *American Express Co. v. Fox*, 489.

2. *Injunction. Relief. Right to.*

Defendant, a resident of Tennessee, will not be enjoined from suing a complainant in the State of Mississippi on a cause of action arising in Tennessee, because it would be to complainant's convenience to be sued in Tennessee, or because the rules of law in Mississippi are slightly different, for probably the laws of Tennessee would be applied and such an injunction should be granted only in a very special case, and not one merely where the practice in two State differed. *Ib.*

3. *Injunction. Relief. Right to.*

The courts of the forum will not at the suit of a nonresident corporation which might remove a suit brought by a resident of the State to the federal courts, enjoin a resident from suing in a foreign State, for such corporation could not be compelled to submit to the jurisdiction of the local courts. *Ib.*

4. *Banks and banking. Rights of stockholders. Representation.*

Under the New York statute, authorizing the superintendent of banks to ascertain financial condition and make assessments on stockholders by arbitrary determination, and allowing the corporation ten days to apply for injunction, the doctrine of representation of stockholders by the corporation does not ap-

 CONGRESS OF THE UNITED STATES.

CONFLICT OF LAWS— Continued.

ply, nor does the failure of the corporation to apply for injunction estop the stockholders and make the assessment binding;— and the assessment, being arbitrary, will not be enforced in Tennessee. *Van Tuyl v. Carpenter*, 629.

5. *Evidence. Rules of evidence. Operation. Comity.*

No State can impose upon any other a rule of evidence for use in the courts of the latter. *Ib.*

6. *Corporations. Stockholder's liability. Statutes. Retroactive effect.*

A statutory amendment of another State, adopted after making of contract of subscription to corporation stock, and even after bill to enforce assessment on such stock, cannot apply to the case so brought or the contract involved therein, even under the rule of comity. *Ib.*

7. *Courts. Decisions controlling. Validity of statute. Analogy with other acts.*

The holding that New York laws as to arbitrary assessment by the banking superintendent on stockholders will not be enforced in Tennessee does not require a similar holding as to Acts 1913, chapter 20, which requires the banking superintendent to bring corporate affairs before the court of chancery. *Ib.*

8. *Banks and banking. Stockholder's liability. Validity of statutes. Determination. Statutes of other states.*

In suit in Tennessee to collect arbitrary assessments on stock by the New York banking commission, the question is not whether the statute authorizing such assessments is valid, but whether public policy of Tennessee permits such power to vest in a ministerial officer. *Ib.*

9. *Banks and banking. Insolvency receivers. Actions.*

The right of the New York banking commissioner to recover assessments under New York law in Tennessee depends on the statute, and unless the right to sue in foreign State is given by statute, he cannot sue in such State. *Ib.*

10. *Receivers. Jurisdiction. Action by receiver. Foreign States.*

The rule is general that a mere chancery receiver cannot sue in a foreign State, and can assert claims only through exercise of comity by the State in which he seeks to exercise his functions, and the rule necessarily attributes the duties of a receiver to an officer of a foreign State claiming authority under its legislative act, since foreign laws can have not extraterritorial efficacy, save in those instances which are governed by the "full faith and credit" clause of the federal Constitution. *Ib.*

 CONGRESS OF THE UNITED STATES.

Attorney and client. United States. Powers of congress.

Congress has the power to determine the conditions upon which the government will consent to be sued, or upon which it will grant pensions or other bounties, or prescribe conditions upon which attorneys will be allowed to represent claimants or liti-

 CONSTITUTION—CONSTITUTIONAL LAW.

CONGRESS OF THE UNITED STATES—Continued.

gants before any of the courts of the government, within certain reasonable limitations, if done by general laws applicable to all alike, and in advance of the services rendered in such courts. *Moyers v. Memphis*, 263.

CONSTITUTION CITED AND CONSTRUED

- § 1, art. 6. Bail. Pending appeal. Violation of ordinance. *Deming v. Nichols*, 295.
- § 1, art. 6. Courts. Establishment. Powers of legislature. "Inferior courts." Clerks of courts. Judges. Establishment of offices. Statutes. Validity. Appointment. *Hodge v. State*, 525.
- § 5, art. 1, (1870). Pardon. Time of granting. "Conviction." *State ex rel. Barnes v. Garrett*, 617.
- § 6, art. 3. Pardon. Time of granting. "Conviction." *Ib.*
- § 7, art. 8, ch. 2. Pardon. Time of granting. "Conviction." *Ib.*
- § 8, art. 11. Statutes. Constitutionality of Special acts. *Quinn v. Hester*, 373.
- § 12, art. 1. Liens. Conditional sales. Lien for automobile injury. Priorities. "Deodand." *Parker-Harris Co. v. Tate*, 509.
- § 17, art. 2. Statutes. Construction. Title of act. *Mengel Box Co. v. Fowlkes*, 202.
- § 17, art. 2. Statutes. Validity. Subjects and titles of acts. *McCormick v. State*, 218.
- § 17, art. 11. Judges. Appointment. Powers of legislature. *Hodge v. State*, 525.
- § 21, art. 1. Eminent domain. Right to compensation. *Railroad Co. v. Moriarity*, 446.
- § 26, art. 2. Clerks of courts. Judges. Holding two offices. "Lucrative office." *Hodge v. State*, 525.
- § 28, art. 2. Taxation. Special statutes. Constitutionality. *Quinn v. Hester*, 373.
- § 29, art. 2. Taxation Special statutes. Constitutionality. *Ib.*

CONSTITUTIONAL LAW.

1. *Liberty of contract. Regulation. Powers of congress.*

Congress has the power to regulate and restrain the conduct and contracts of all persons for the common good, the possession and enjoyment of liberty and property being subject to such reasonable conditions as may be essential to the safety, health, peace, good order, and morals of the community. *Moyers v. Memphis*, 263.

2. *Powers of congress. Liberty of contract.*

The liberty of contract is one of the inalienable rights of a citizen, embracing as it does, the right to enter a lawful calling and to acquire and dispose of property, so that a general prohibition against entering into contracts with respect to property is unconstitutional and void. *Ib.*

3. *Due process of law. Construction.*

The due process of law clauses of the federal Constitution, while designed to preserve life, liberty, and property inviolate against arbitrary power, were not intended to interfere with the police power of the different States. *Ib.*

 CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

 4. *Liberty of contract. Regulation. Powers of congress.*

Liberty of contract and right of property are not absolute and universal, in spite of the Fifth and Fourteenth Amendments to the United States Constitution, and it is within the power of the government to restrain some individuals from all contracts, as well as all individuals from some contracts. *Ib.*

 5. *Taxation. Special statutes. Constitutionality.*

Chapter 667, Priv. Acts 1915, incorporating a school district, levying a school tax on such district, and providing for its collection by the county trustee, is not in contravention of constitution article 2, section 29, forbidding the delegation of the power of taxation except to counties or incorporated towns. *Quinn v. Hester*, 373.

 6. *Taxation. Special statutes. Constitutionality.*

Nor is it in contravention of constitution article 2, section 28, requiring equality and uniformity of taxation, since such constitutional provision does not prevent local taxation for local purposes. *Ib.*

 7. *Statutes. Constitutionality of special acts.*

Nor is it contravention of constitution article 11, section 8, providing that the legislature shall have no power to suspend any general law for the benefit of any particular individual, etc., since such constitutional provision does not inhibit legislation respecting municipal or public corporations. *Ib.*

 8. *Legislative power. Policy.*

The power of legislature is limited only by the Constitution, and its acts cannot be declared unconstitutional merely for reasons of policy. *Ib.*

 9. *Eminent domain. Right to compensation.*

Under Const. art. 1, sec. 21, providing that no property shall be taken or applied to public use without consent or without just compensation, when a portion of a street immediately adjacent to a complaining owner's property is obstructed so as to destroy or substantially impair the owner's easement of access or way in the street abutting his land, he is entitled to compensation. *Railroad Co. v. Moriarity*, 446.

 10. *Eminent domain. Right to compensation. "Taking."*

Under Const. art. 1, sec. 21, providing that no property shall be taken or applied to public use without consent or without just compensation, any diminution of the value of property directly invaded which is not shared by the public generally is a "taking." *Ib.*

 11. *Eminent domain. Right to compensation. Closing street.*

Where a street is closed by elevation of railroad tracks not abutting on, but adjacent to, plaintiff's land he is entitled to compensation under Const. art. 1, sec. 21, prohibiting taking property for public use without compensation, since his easement of access extends from his land to the next intersecting street in either direction. *Ib.*

 CONTRACTS.

CONSTITUTIONAL LAW—Continued.

12. *Eminent domain. "Police power." Exercise of power. What constitutes.*

Closing a street by elevation of railroad tracks for safety of the public is referable to the power of eminent domain, and not to the police power, since the latter, though it may take property, does not appropriate it to a different use; while eminent domain transfers private property to a public agency to use as its own. *Ib.*

13. *Eminent domain. Class legislation. Discrimination against particular corporations.*

Acts 1907, ch. 254, authorizing any railroad company, now or hereafter owning or operating a railroad to condemn for reservoir purposes, etc., does not violate Const. art. 11, sec. 8, or Const. U. S. Amend. 14, sec. 1, prohibiting class legislation, although it does not confer the same right upon new railroad companies until they own or operate a railroad. *Lea v. Railroad Co.* 560.

 CONTRACTS.

1. *Landlord and tenant. Leases. Legality of object.*

Where a lease of a building does not itself set forth an illegal intent or use, and where nothing else appears, the lessor is not debarred from recovery of rent by his knowledge that the tenant intends to put the premises to illegal use. *Bank of Com. & Trust Co. v. Burke*, 19.

2. *Landlord and tenant. Leases. Legality of object.*

Although a lease of a building does not itself set forth any illegal intent or use, if the lessor at the time of leasing knows and intends that the premises shall be used for an illegal purpose, such as prohibited sales of intoxicating liquor, and he does anything in furtherance of the transgression, he cannot recover rent. *Lb.*

3. *Landlord and tenant. Leases. Legality of object. "Storehouse."*

Where a building had long been occupied as a saloon, was so outfitted was offered for rent as peculiarly valuable for a saloon business, and after the leasing was used for a saloon by the lessee and sublessee with the knowledge of the agents of lessors, although it was leased in terms for use as a "storehouse," lessors could not recover rent (citing Words and Phrases, First Series, Storehouse). *Ib.*

4. *Landlord and tenant. Leases. Legality of object.*

If premises be leased for lawful purposes, the mere noninterference by landlord with subsequent illegal traffic of his tenant, after becoming aware of it, does not involve him in the tenant's guilt as showing participation. *Ib.*

5. *Commerce. Interstate commerce. Validity of contract. Complaint.*

A complaint for breach of contract by an interstate carrier for an expedited shipment which does not show that the carrier had no published tariff covering such shipments, does not show that the contract was illegal under the Interstate Commerce Act of Feb.

CONTRACTS.

CONTRACTS—Continued.

4, 1887, chapter 104, section 3, 24 Stat. 380 (U. S. Comp. St. 1913, section 8565), and the Elkins Act, Feb. 19, 1903, chapter 708, 32 Stat. 847. (U. S. Comp. St. 1913, sections 8597-8599). *Roberts v. Railroad*, 48.

6. *Commerce. Interstate commerce. Validity of contract.*

In an action for breach of an interstate carrier's contract for an expedited shipment, where it appeared that there was no published tariff for such shipment, the contract was illegal under the Interstate Commerce Act and the Elkins Act, since it gave an undue advantage to the shipper, and there could be no recovery thereon. *Ib.*

7. *Principal and surety. Fidelity bonds. Construction of contract.*

Contracts of fidelity insurance are to be likened to contracts of insurance rather than to contracts of personal suretyship, and are to be construed by the same exact rules of the law of insurance, and the language of the bond, being that selected and employed by the insurer issuing it for a consideration, when ambiguous or doubtful, must be given the strongest interpretation in favor of the person indemnified which it will reasonably bear. *Green v. Fidelity & Guaranty Co.*, 117.

8. *Principal and surety. Fidelity bonds. Renewal contract. Construction. Term.*

Under a fidelity bond against pecuniary loss from the fraud or dishonesty of the president of a banking and trust company amounting to embezzlement or larceny, issued in 1908, which provided indemnity during the term, and any subsequent renewal of such term by reason of the specified acts "committed during the continuance of such term or any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter, expressed an intention to protect against losses within the period specified in the bond, and provided that on its execution the insurer should not thereafter be liable under any bond previously issued to the insured, and that on the issuance of any subsequent bond all liability should cease, that only one bond should be in force at one time, unless otherwise stipulated, and which was renewed annually upon an additional consideration, "subject to all the covenants and considerations of the original bond," the renewals constituted separate contracts, and the insured could not recover unless the alleged defaults occurred on some specified date or in some specified period covered by one of such contracts, and discovered within the time limited therefor. *Ib.*

9. *Action. Contract or tort. Action on contract.*

An action against the bank for damages resulting from breach of a contract to loan money is an action sounding in contract, and not in tort. *Farabee-Treadwell Co. v. Bank & Trust Co.*, 208.

10. *Contracts. Mutuality. Contract to loan money.*

A bank is liable for breach of a contract to loan money in consideration of the transfer of a deposit, such a contract not being unilateral, the consideration being the agreed transfer of deposit. *Ib.*

 CONTRACTS.

CONTRACTS—Continued.

 11. *Contracts to loan money. Damages for breach. Loss of profits.*

Where a bank breached a contract to loan a grain dealer Money with which to pay for corn purchased, and the grain dealer was thereby compelled to make a forced sale of the grain he was entitled to recover the loss actually suffered by reason of the forced sale, but he was not entitled to recover a profit which he might have made by reason of an advance in the market; such profit being purely speculative. *Ib.*

 12. *Constitutional law. Liberty of contract. Regulation. Powers of congress.*

Congress has the power to regulate and restrain the conduct and contracts of all persons for the common good, the possession and enjoyment of liberty and property being subject to such reasonable conditions as may be essential to the safety, health, peace, good order, and morals of the community. *Moyers v. Memphis*, 263.

 13. *Constitutional law. Powers of congress. Liberty of contract.*

The liberty of contract is one of the inalienable rights of a citizen, embracing as it does, the right to enter a lawful calling and to acquire and dispose of property, so that a general prohibition against entering into contracts with respect to property is unconstitutional and void. *Ib.*

 14. *Constitutional law. Liberty of contract. Regulation. Powers of congress.*

Liberty of contract and right of property are not absolute and universal, in spite of the Fifth and Fourteenth Amendments to the United States Constitution, and it is within the power of the government to restrain some individuals from all contracts, as well as all individuals from some contracts. *Ib.*

 15. *Railroads. Conveyances. Construction. Conditions subsequent. Right of way.*

A contract to which deed for a right of way referred, whereby a land company granted an interurban railroad a right of way "on the following conditions," that it would grade the way, etc., with a forfeiture providing for a breach of condition, which necessarily implied the right of re-entry, created condition subsequent, rather than covenants running with the land, so that a purchaser in insolvency proceedings and its successors were not affected thereby. *Land Co. v. Interurban Co.*, 353.

 16. *Rights of stockholders.*

The liability of a stockholder for assessments arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such a relation to it as that he is bound by its terms, and may be said to agree by implication that he will pay when the conditions of his liability for a specific amount are lawfully made to appear. *Van Tuyl v. Carpenter*, 629.

CORPORATIONS.

CORPORATIONS.

1. *Banks and banking. Cashier. Duties of. "Partnership."*

Where a bank cashier who was also a member of a firm issued a draft to pay a firm obligation embezzling the bank's funds in his capacity as cashier, the bank cannot recover from the payees the amount of the draft on the theory that the cashier was merely paying his own obligation; for the commercial idea is that a partnership is practically an entity separate from the members composing it; this being particularly true as the name of the partnership indicated it was a corporation (citing Words and Phrases, Partnership). *Pemiscot County Bank. v. Nat. Bank.* 13.

2. *Names. Presumptions.*

The name "Tindle Cotton Company" is *prima facie* that of a corporation and not a partnership, and will be so treated by way of presumption in the absence of proof. *Ib.*

3. *Liability of shareholders for subscriptions.*

Under a subscription contract, making all subscriptions contingent upon the whole amount being subscribed, no assessments can be enforced until the entire capital stock has been subscribed. *Heiskell v. Morris*, 238.

4. *Liability of shareholders for subscriptions.*

Promoters who complete subscription by subscribing for the balance of unsold shares, intending to sell such shares to others, are liable for the amount so subscribed. *Io.*

5. *Subscriptions to capital stock. "Procure."*

A subscription contract, providing that all subscriptions are on condition that the promoters "procure" subscriptions to the full amount of the capital stock, held not to require that all subscriptions be made by persons other than the promoters. *Ib.*

6. *Liability of shareholders for subscriptions.*

Subscriptions of corporate stock by insolvent persons cannot be counted to hold other subscribers for the amount of their subscriptions; but, if such subscriber was apparently solvent at the time he made the subscription, no fraud is perpetrated upon other subscribers by the acceptance of his subscription in good faith, though he afterward proves to have been insolvent. *Ib.*

7. *Actions on subscriptions. Burden of proof.*

The insolvency of a subscriber, as relieving other subscribers from obligation to pay subscriptions, is a matter of defense, the burden of proving which is on those subscribers asserting it. *Ib.*

8. *Subscriptions. Fraud. Laches of shareholder.*

The shareholder, whose subscription is obtained through fraud, must be diligent in discovering the fraud and repudiating the contract, to avoid his subscription as against creditors of the corporation. *Ib.*

COSTS.

CORPORATIONS—Continued.

9. *Subscriptions. Fraud. Laches of shareholder.*

Where subscribers for more than two years took no steps to repudiate subscriptions, but allowed their names to remain on the corporate books as shareholders, and paid one assessment, *held*, that they could not defeat an action by receiver to recover unpaid subscriptions on the ground of fraud. *Ib.*

10. *Bankruptcy. Proof of claim. Action.*

In the case of a bankrupt corporation, the bankruptcy act does not restrain a creditor who has not proved his claim in bankruptcy from prosecuting an action to judgment to enforce his lien upon the property attached or to charge officers or stockholders liable for the debts of the corporation. *Hotel Co. v. Construction Co.*, 305.

11. *Right of stockholders. Representation. Powers. Statutes. Construction.*

The power of representation by a corporation of its stockholders which may, by mere failure to exercise it, estop the stockholders to deny liability for an arbitrary assessment of the full value of their stock, ought to be conferred in unmistakable terms of the statute itself, and will not be conferred by construction. *Van Tuyl v. Carpenter*, 629.

12. *Stockholder's liability. Statutes. Retroactive effect.*

A statutory amendment of another State, adopted after making of contract of subscription to corporation stock, and even after bill to enforce assessment on such stock, cannot apply to the case so brought or the contract involved therein even under the rule of comity. *Van Tuyl v. Carpenter*, 629.

13. *Right of stockholders. Contracts.*

The liability of a stockholder for assessments arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such a relation to it as that he is bound by its terms, and may be said to agree by implication that he will pay when the conditions of his liability for a specific amount are lawfully made to appear. *Ib.*

COSTS.

1. *On appeal. Expense of bill of exceptions. Unnecessary matter. "Full costs."*

Where a successful appellant in an action at law, by violating supreme court rule 2 (126 Tenn. 716, 160 S. W. vii), requiring bills of exception to state testimony in narrative and concise form, increased materially the size of the transcript, he should pay one-half of the appeal costs, notwithstanding the rule that in actions at law the successful party is entitled to recover full costs, since "full costs" do not include costs so added. *Perkins v. Brown*, 140.

2. *Change in subject matter pending suit.*

During the pendency of an action to enjoin telephone companies from constructing lines across a railroad right of way, defendants

 COURTS.

COSTS—Continued.

erected new poles and strung wires thereon property, the previous construction being defective. Held that costs in lower court should be paid by defendants, while costs of appeal should be paid by appellant railroad company. *Railroad v. Telephone Co.*, 198.

3. *Pardon. Effect. Payment of costs.*

A pardon does not release a convict from costs of the prosecution. *State ex rel. Barnes v. Garrett*, 617.

 COURTS.

1. *Statutes. Construction. Title of act.*

Priv. Acts 1915, chapter 186, entitled "An act to establish a levee and drainage district . . . and for the purpose of draining and the reclamation of the wet and swamp lands, . . . and prescribe the method of doing so, and providing for the assessment and collection of the cost and expense of such improvement, and the manner of obtaining the means and funds therefor," is violative of Constitution article 2, section 17, providing that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title, in that section 4 of the act provides that a court composed of the chairman or judges of the county courts of the counties within the district shall sit once each month for the purpose of hearing and determining such questions as may be necessary to be passed upon under the act; it creating a new and independent court. *Mengel Box Co. v. Foulkes*, 202.

2. *Establishment. Powers of legislature. "Inferior courts."*

Priv. Laws 1915, ch. 78, establishing a criminal court in Dyer county and prescribing its jurisdiction, is within the power conferred on the Legislature by Const. art. 6, sec. 1, declaring the judicial power shall be vested in the supreme court, and in such circuit, chancery, and other inferior courts as the legislature shall ordain and establish, since the new court is an "inferior court." *Hodge v. State*, 525.

3. *Common law. Rules of decision. Decisions of other courts.*

The courts of a State may refuse to follow even a consensus of authority in all other States, or a well-recognized rule of common law, on the ground that it is not suited to the genius of the State or is opposed to its public policy; the public policy of a State being shown by its statutes and decisions. *Northcut v. Church*, 541.

4. *Decisions controlling. Matters not contested.*

While a decision that assessments by the comptroller of the currency are conclusive necessarily implies that they are valid, yet when that power is merely assumed without examination, the point cannot be successfully used by analogy in determining the validity of a statute authorizing assessments by the banking commissioner, where the question is directly raised. *Van Tugel v. Carpenter*, 629.

COVENANTS—CRIMINAL LAW.

COVENANTS.

1. *"Incumbrance." Railway right of way. Damage.*

Where land sold under warranty encroached on a railroad right of way, such right was an incumbrance and the grantee on removing it would recover the amount necessarily paid in so doing, with interest, if fair and reasonable, as damages for the breach of covenant. *Pritchard v. Rebori*, 328.

2. *Covenants running with land. Binding force.*

Covenants running with the land bind even purchasers at sales *in invitum*. *Land Co. v. Interurban Co.*, 353.

CRIMINAL LAW.

1. *Trial. Conduct of counsel.*

Counsel should not argue from evidence excluded by the court, or upon other cases, where there is nothing in the record to sustain the reference. *McCormick v. State*, 218.

2. *Reception of evidence. Identity of accused. Liquor license.*

In a prosecution for selling liquor within four miles of a school-house, evidence held not to sufficiently identify the accused with one Mae Elmore to permit the introduction in evidence of a federal liquor license to one Mrs. Mae Elmore to engage in the business of retail liquor dealer. *Elmore v. State*, 347.

3. *Sales. Conditional sales. Criminal responsibility for transfers. Statutes. Construction. "Knowingly or willfully."*

Laws 1909, ch. 557, sec. 1, making it unlawful to remove from the State any personalty, title to which was retained at time of sale, unless written consent of the seller is obtained, having omitted the words "knowingly" or "willfully," does not require intent to defraud as an element of the offense, but the bare removal, even if in good faith constitutes the offense. *Pappas v. State*, 499.

4. *Appeal. Reversal. Failure to instruct. Statute.*

Where refusal to give proper instructions does not affect the result, the verdict being fully in accord with the merits of the case, the case must be affirmed, under Acts 1911, ch. 32, providing that no verdict or judgment shall be set aside or any criminal cause for error in the charge, etc., unless in the opinion of the appellate court it affirmatively appears the error has affected the result. *Montgomery v. State*, 577.

5. *Pardon. Waiver.*

A prisoner pardoned pending appeal, who unsuccessfully moves to dismiss his appeal, and does not call the attention of the supreme court to his pardon, the case not being tried on its merits, but affirmed for want of bill of exceptions, and who on remand interposes his pardon in the court below, does not waive the pardon. *State ex rel. Barnes v. Garrett*, 617.

6. *Judicial notice. Pardon.*

Courts do not judicially notice a pardon. *Ib.*

CROSSINGS—DAMAGES.

CROSSINGS.

Railroads. Accidents at crossings. Proximate cause. Obstruction of crossing.

The obstruction of a highway crossing by cars stopped across it is not the proximate cause of injury to a person who was struck by moving cars on another track while he was waiting to cross. *Todd v. Railroad*, 92.

CURTESY.

1. *Requisites. Wife's separate estate.*

Where there was no language, in a deed creating a separate estate cutting off the husband's marital rights beyond the death of the wife, which intention must be clearly expressed, all the elements of a tenancy by curtesy existing, marriage, birth of issue capable of inheriting, seisin in the wife, and death of the wife, the husband was entitled to a tenancy by curtesy. *Travis v. Sitz*, 158.

2. *Wife's separate estate. Construction of deed.*

Under Shannon's Code, section 3672, making the use of the words "heirs and assigns" unnecessary, the failure to use the word "assigns," in a deed conveying a separate estate and imposing a restraint on alienation, would not defeat the surviving husband's right to a tenancy by curtesy. *Ib.*

3. *Wife's separate estate. Construction of deed.*

The words "and her heirs, free from the debts, liabilities, or contracts of her husband, if she should ever marry," in a deed creating a separate estate in a wife, did not by the use of the word "heirs," import a purpose to cut off a right to a tenancy by curtesy in the surviving husband. *Ib.*

4. *Requisites. Release by death of issue.*

Where all the requisites of a tenancy by curtesy have existed, the husband is entitled to curtesy on surviving his wife although all issue have died. *Ib.*

See HUSBAND AND WIFE; LAND AND LAND TITLES.

DAMAGES.

1. *Contracts to loan money. Damages for breach. Loss of profits.*

Where a bank breached a contract to loan a grain dealer money with which to pay for corn purchased, and the grain dealer was thereby compelled to make a forced sale of the grain, he was entitled to recover the loss actually suffered by reason of the forced sale, but he was not entitled to recover a profit which he might have made by reason of an advance in the market; such profit being purely speculative. *Farabee-Treadwell Co. v. Bank & Trust Co.*, 208.

2. *Covenants. "Incumbrance." Railway right of way.*

Where land sold under warranty encroached on a railroad right of way, such right was an incumbrance and the grantee on

DEEDS—DIVORCE.

DAMAGES— Continued.

removing it would recover the amount necessarily paid in so doing, with interest, if fair and reasonable, as damages for the breach of covenant. *Pritchard v. Rebori*, 328.

3. *Appeal and error. Scope of review. Intermediate court. Amount of damages.*

Where the trial court and the court of civil appeals concur as to the amount of damages to a property owner by destruction of his easement of access by elevation of railway tracks across an adjacent street, and the evidence is conflicting, the supreme court will treat such concurrent finding as conclusive. *Railroad Co. v. Moriarity*, 446.

DEEDS.

1. *Rights of heirs. Separate estate of wife.*

Under a deed creating a separate estate in a wife, her children could have no interest, save as her heirs at law. *Travis v. Sitz*, 156.

2. *Construction. Property conveyed. Presumptions.*

The natural presumption is that the deed was made after and with reference to an actual view of the premises by the parties. *Pritchard v. Rebori*, 328.

3. *Construction. Property conveyed.*

The object in all boundary questions is to find as nearly as may be certain evidences of what particular land was meant to be included for conveyance. *Ib.*

4. *Construction. Property conveyed. Presumptions.*

The natural presumption is that the deed was made after and with reference to an actual view of the premises by the parties. *Ib.*

5. *Estates on condition. Creation.*

While the words "this conveyance is upon the condition" are usually held to create an estate on condition, they do not necessarily create one, but may be so controlled by other words in the instrument as to fail of that effect. *Land Co. v. Interurban Co.* 353.

6. *Estates on condition. Creation.*

The words relied on as creating the condition on which an estate depends must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it, and a condition may be created by the reference to a condition contained in another instrument, as by reference in a deed to an agreement to convey, with recital that the deed is made pursuant thereto. *Ib.*

DIVORCE.

1. *Decree. Vested and contingent interests.*

A decree in a divorce case operating as a deed and describing a vested remainder interest in lands conveys nothing where

EASEMENTS—EMINENT DOMAIN.

DIVORCE—Continued.

the sole interest is a contingent remainder, and is not cured by a further description including any other property or estate of the defendant. *Scruggs v. Mayberry*, 586.

2. *Decree. Vested and contingent interests.*

A decree attempting to convey a contingent remainder is of no effect, since an instrument purporting to convey such an interest amounts only to an agreement to convey which may be enforced when the contingency happens. *Ib.*

EASEMENTS.

1. *Railroads. Right of way.*

Deeds to a railroad right of way construed, and held to convey only an easement, the fee remaining in the grantor. *Railroad v. Telephone Co.*, 198.

2. *Eminent domain. Right to compensation.*

Rights of railroads put to expense in elevating tracks are not like those of adjacent landowners whose easement of access is destroyed by the elevation of tracks, since the railroads still have their original easement, but the owners do not. *Railroad Co. v. Moriarity*, 446.

ELECTION AND REMEDIES.

Abatement and revival. Other action pending. Ground for demurrer.

To recover land conveyed in violation of a restraint on alienation, pendency of a prior suit on the same matter would not be ground of demurrer, but for motion to elect. *Travis v. Sitz*, 156.

EMINENT DOMAIN.

1. *Right to compensation.*

Under Const. art. 1, sec. 21, providing that no property shall be taken or applied to public use without consent or without just compensation, when a portion of a street immediately adjacent to a complaining owner's property is obstructed so as to destroy or substantially impair the owner's easement of access or way in the street abutting his land, he is entitled to compensation. *Railroad Co. v. Moriarity*, 446.

2. *Right to compensation. "Taking."*

Under Const. art. 1, sec. 21, providing that no property shall be taken or applied to public use without consent or without just compensation, any diminution of the value of property directly invaded which is not shared by the public generally is a "taking." *Ib.*

3. *Right to compensation. Closing street.*

Where a street is closed by elevation of railroad tracks not abutting on, but adjacent to, plaintiff's land, he is entitled to compensation under Const. art. 1, sec. 21, prohibiting taking property for public use without compensation, since his easement of

EMINENT DOMAIN.

EMINENT DOMAIN—Continued.

access extends from his land to the next intersecting street in either direction. *Ib.*

4. *"Police power." Exercise of power. What constitutes.*

Closing a street by elevation of railroad tracks for safety of the public is referable to the power of eminent domain, and not to the police power, since the latter, though it may take property, does not appropriate it to a different use; while eminent domain transfers private property to a public agency to use as its own. *Ib.*

5. *Right to compensation.*

Rights of railroads put to expense in elevating tracks are not like those of adjacent landowners whose easement of access is destroyed by the elevation of tracks, since the railroads still have their original easement, but the owners do not. *Ib.*

6. *Highways. Use for other public purposes. Underground pipes.*

Laying water pipes under a county highway creates an additional servitude upon the fee interest, for which the abutting owner may recover, notwithstanding the county has consented to such action so far as its easement in the surface is concerned. *Lea v. Railroad Co.*, 560.

7. *Constitutional law. Class legislation. Discrimination against particular corporations.*

Acts 1907, ch. 254, authorizing any railroad company, now or hereafter owning or operating a railroad to condemn for reservoir purposes, etc., does not violate Const. art. 11, sec. 8, or Const. U. S. Amend. 14, sec. 1, prohibiting class legislation, although it does not confer the same right upon new railroad companies until they own or operate a railroad. *Ib.*

8. *Extent of power. Statutory construction.*

Under Acts 1907, ch. 254, authorizing a railroad to condemn a pipe line between a running stream and its reservoir or tanks, a pipe line may be condemned between a reservoir formed by damming a running stream and the railroad's tanks. *Ib.*

9. *Proceedings to take. Offenses. Threatened misuser.*

Where a railroad company has been granted eminent domain power for pipe line purposes, an owner cannot defeat condemnation proceedings upon the ground that the railroad intends to divert some of the water to purposes not contemplated by the statute. *Ib.*

10. *Rights acquired. Misuser. Who may question.*

Where a railroad has power to condemn for pipe line purposes, only the State, may question its diversion of the water to purposes not contemplated by the statute. *Ib.*

EQUITABLE ESTATES—ESTOPPEL.

EMINENT DOMAIN—Continued.

11. *Nature. Acts constituting. Appropriation.*

Where a pipe line was located along a highway and the pipe laid thereon awaiting the digging of ditches in which it was to be placed, held the abutting owners' fee interest in the highway was taken so as to authorize him to bring suit under Shannon's Code, secs. 1866, 1867. *Ib.*

12. *Remedies of owner. Injunction. Failure to institute condemnation proceedings.*

Where defendant railroad company had the right to condemn complainant's fee interest in a highway, and had already taken possession of it, complainant could not enjoin completion of the work, although no condemnation proceedings had been started. *Ib.*

EQUITABLE ESTATES.

See LAND AND LAND TITLES.

EQUITY.

1. *Bill of review. Right to file. Minors.*

A minor may file an original bill in the nature of a bill of review to question matters adjudged against him. *Travis v. Sitz*, 156.

2. *Attachment. Proceedings. Change in theory of attachment.*

A plaintiff, who has attached a party's effects, both at law and equity, may dismiss his attachment at law and proceed in equity. *Niehaus v. Construction Co.*, 382.

EQUITY, PLEADING AND PRACTICE.

See. PLEADING AND PRACTICE.

ESTOPPEL.

1. *Bills and notes. Forgery. Statute.*

Where defendant by her mortgage of realty to secure a certain described note thereby adopted and ratified the note, although it had been forged, and where after her ratification and the delivery of the mortgage and the note to the mortgagee the mortgagee released and turned over to her son-in-law a stock of goods which had been previously assigned for the mortgagee's benefit, an estoppel *in pais* arose against the defendant, precluding her from setting up forgery under section 23 of the Negotiable Instruments Act (Laws 1899, chapter 94). *Dry Goods v. Hill*, 60.

2. *Equitable estoppel. Intent.*

To constitute estoppel, the act relied on must have been done with the knowledge or intent that it would be relied on. *Early Co. v. Williams*, 249.

EVIDENCE.

ESTOPPEL—Continued.

3. *Equitable estoppel. Knowledge of facts.*

It is essential to estoppel that the person claiming it was himself not only destitute of knowledge of the facts, but without available means of acquiring such knowledge; for there can be no estoppel where both parties have the same means of ascertaining the truth. *Ib.*

EVIDENCE.

1. *Landlord and tenant. Actions for rent. Evidence of illegal use of premises.*

Acts of the parties to the lease, before and after its making, may be proven to show their intent in making it. *Bank of Com. & Trust Co. v. Burke*, 19.

2. *Description of mortgaged premises. Parol evidence.*

In such case no particular realty was indicated with sufficient certainty to permit of parol proof to correct or apply the attempted description, as a description of land applicable with equal exactness to any one of a number of tracts cannot be aided by parol evidence. *Dry goods v. Hill*, 60.

3. *Rape. Corroboration of female.*

In Pub. Acts 1911, chapter 86, providing punishment for criminal abuse of females, the proviso that no conviction shall be had on the unsupported testimony of the female is complied with if there is adduced sufficient evidence of another than the female which fairly tends to convict the defendant of the crime. *Bledsoe v. The State*, 143.

4. *Rape. Corroboration of female.*

Such evidence need not be direct and positive, in the sense of being sufficient to convict, independent of that of the female alleged to have been debauched, but simply as to such facts or circumstances as tend to support the female in her testimony upon fact or facts essential to constitute the offense. *Ib.*

5. *Corporations. Actions on subscriptions. Burden of proof.*

The insolvency of a subscriber, as relieving other subscribers from obligation to pay subscriptions, is a matter of defense, the burden of proving which is on those subscribers asserting it. *Heiskell v. Morris*, 238.

6. *Boundaries. Parol evidence. Intent.*

A grant of land bounded on a street will be referred to the street as built and used, and not as shown on a recorded map or plat; but if the land is conveyed bounded by a highway, parol evidence is admissible to show whether the actual or the surveyed line was intended. *Pritchard v. Rebori*, 328.

7. *Criminal law. Reception of evidence. Identity of accused. Liquor license.*

In a prosecution for selling liquor within four miles of a school-house, evidence held not to sufficiently identify the accused with

 EXCHANGES—EXEMPTIONS.

EVIDENCE—Continued.

one Mae Elmore to permit the introduction in evidence of a federal liquor license to one Mrs. Mae Elmore to engage in the business of retail liquor dealer. *Elmore v. State*, 347.

8. *Negligence. Burden of proof.*

The law imposes on plaintiff suing for injuries caused by negligence the burden of showing by a preponderance of the evidence that the negligence was the cause of his injury, and that defendant was responsible for the negligence. *Memphis St. Ry. Co. v. Cavell*, 462.

9. *Rules of evidence. Operation. Comity.*

No State can impose upon any other a rule of evidence for use in the courts of the latter. *Van Tuyl v. Carpenter*, 629.

10. *Insurance. Life policies. Refusal to pay loss. Right to statutory penalty.*

Evidence held sufficient to show that insurer's refusal to pay loss on life policy was not in good faith. *Selliman v. Life Ins. Co.*, 646.

11. *Sheriffs and constables. Powers and duties. Breach.*

Evidence held to show that a sheriff failed to perform his duties to prevent and suppress breaches of the peace by unlawful sale and threatened unlawful sale of intoxicating liquors. *State ex rel. v. Reichman*, 653.

EXCHANGES.

1. *Property in seat. Right to compel transfer.*

Where the charter of a cotton exchange expressly provided that its members were not stockholders, the rule that a purchaser of stock may compel, by a bill in equity, the transfer of the same on the books of the corporation, and that a corporation must issue a certificate of stock to one entitled to it, does not apply to the sale of a seat in the exchange. *Keyser v. Memphis Cotton Co.*, 414.

2. *Transfer of memberships.*

Where a provision of the constitution and by-laws of a cotton exchange was that "every member upon admission, pledges himself to abide by the constitution and also by all the by-laws, rules, and regulations of the Exchange," a provision of the constitution that no certificate of membership shall be transferred until the intention is posted for ten days and until all claims presented by other members within the ten days are settled was binding upon all members, and cannot be complained of by a third party. *Ib.*

EXEMPTIONS.

Statutes. Construction.

Under Shannon's Code, section 3794, exempting in the hands of every male citizen, and every female head of a family, two

FRAUD— HIGHWAYS.

EXEMPTIONS—Continued.

horses or mules, together with wagons, harness, and saddles, etc., an automobile is not exempt; it being property entirely dissimilar to that exempted and used by a different class of citizens from those intended to be protected by the exemption statute. *Prater v. Reichman*, 485.

FRAUD.

Corporations. Subscriptions. Laches of shareholder.

The shareholder, whose subscription is obtained through fraud, must be diligent in discovering the fraud and repudiating the contract, to avoid his subscription as against creditors of the corporation. *Heiskell v. Morris*, 238.

HIGHWAYS.

2. *Frightening mule. Liability of automobile owner. Statute.*

Where defendant's automobile was not registered as required by Acts 1905, chapter 173, when he operated it on the highway, and his failure to register it had no connection with and in no way caused the frightening of plaintiff's mule, which tipped over her buggy and injured her, defendant's failure to register his car alone, without negligence in its operation, did not render him liable to plaintiff; as the statute discloses no purpose to make failure to comply with its first section, requiring registration, the ground of liability of the owner of an automobile for any further sum than the fine of \$25 to \$100 prescribed by section 6. *Ib.*

1. *Frightening mule. Action against automobile owner. Instruction. Statute.*

In an action against an automobile owner for injuries to plaintiff on a highway, where the court charged that, if defendant failed to comply with Acts 1905, chapter 172, section 1, requiring the registration of automobiles, his conduct was negligence *per se*, and that, if an injury resulted to plaintiff by reason of such negligence and the wrongful act of defendant in violating the statute, the latter was liable for damages, also that, if he had the machine registered, he had a right to operate it, but, if it was not registered, he was liable for damages caused directly or approximately by its being operated along the public highway, such instruction was erroneous as leading the jury to conclude that defendant was liable if the mule drawing plaintiff's buggy took fright at the automobile, injury resulting consequently at a time when the automobile was on the public highway and not registered in defendant's name whether the defendant was or was not negligent in the management of the automobile under the common law or sections 3 and 4 of the act. *Black v. Moree*, 73.

3. *Eminent domain. Use for other public purposes. Underground pipes.*

Laying water pipes under a county highway creates an additional servitude upon the fee interest, for which the abutting

HUSBAND AND WIFE.

HIGHWAYS—Continued.

owner may recover, notwithstanding the county has consented to such action so far as its easement in the surface is concerned. *Lea v. Railroad*, 560.

HUSBAND AND WIFE.

1. *Wife's separate estate.. Conveyance creating.*

In a conveyance of real estate to a daughter, to take effect after the death of the grantor and his wife, the words "to have and to hold said tract of land to the said L. H. and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry, and not to be liable to be sold for the debts of any husband she may have if she ever marries," created a separate estate, without the aid of a clause restraining alienation. *Travis v. Sitz*, 156.

2. *Wife's separate estate. Statute.*

Shannon's Code, sections 4234, 4235, providing that there can be no dispossession of the husband or wife on a sale under execution of the husband's interest in the wife's general real estate during the life of the wife, that it cannot during her life be aliened by the husband, and Acts 1897, chapter 141, reducing the husband's rights of curtesy in the wife's land, have no bearing on the inferences to be drawn from the language of a deed showing an intention to create a separate estate in the wife. *Ib.*

3. *Wife's separate estate. Necessity of trustee.*

A trustee is not essential to the creation of a separate estate. *Ib.*

4. *Separate estate. Property of wife at time of marriage.*

Although property may be given to a woman to her sole and separate use while she is single, and not in contemplation of any particular intended marriage, the peculiar properties of the separate estate did not and cannot exist until she is married. *Ib.*

5. *Wife's separate estate. Statute.*

Acts 1913, chapter 26, removing the disabilities of coverture in respect to married women, and practically making their estates separate, does not interfere with or disturb the creation or operation of equitable separate estates, since the removal by the statute of the wife's disabilities increased rather than diminished the necessity for such estates. *Ib.*

6. *Wife's separate estate.- Restraint on alienation. Power of court.*

Where a bill was filed by the husband and wife in substantially an *ex parte* proceeding for the purpose of obtaining leave of the chancellor to violate a clause restraining alienation in a deed creating a separate estate in the wife, the chancellor was without jurisdiction of the subject-matter, and his decree was inoperative. *Ib.*

7. *Judgment. Collusive decree. Effect.*

A collusive decree between husband and wife can be treated, as to third parties, only as a deed between them. *Ib.*

HUSBAND AND WIFE.

HUSBAND AND WIFE—Continued.

8 *Judgment. Collusive decree. Construction of deed.*

A collusive decree, obtained by a husband and wife concerning the validity of a deed, or of any clause thereof, filed against persons who on the face of the bill had no interest in the controversy, will be treated as to third persons only as a deed between the husband and wife. *Ib.*

9. *Separate estate of wife. Conveyance.*

The rule that a married woman will not be permitted in a court of equity to disaffirm a voidable sale made by her, the consideration of which has been paid directly to her, except on condition that she refund the purchase money, or that it be declared a lien on the property, does not apply where the sale has been made in violation of a restraint on alienation. *Ib.*

10. *Separate estate of wife. Conveyance.*

Where a married woman disaffirms a sale made by her of her separate estate, voidable because of a restraint on alienation, she may recover such rents accruing from the date when she surrendered possession. *Ib.*

11. *Descent and distribution. Right of heirs. Wife's separate estate.*

Where a sale by a married woman of property constituting her separate estate is void because of a restraint on alienation, although her heirs at law cannot recover rents accruing before her death, in the absence of a tenancy by curtesy in the surviving husband, they could recover for rents not in arrears at her death. *Ib.*

12. *Curtesy Requisites. Wife's separate estate.*

Where there was no language, in a deed creating a separate estate, cutting off the husband's martial rights beyond the death of the wife, which intention must be clearly expressed, all the elements of a tenancy by curtesy existing, marriage, birth of issue capable of inheriting, seisin in the wife, and death of the wife, the husband was entitled to a tenancy by curtesy. *Ib.*

13. *Curtesy. Wife's separate estate. Construction of deed.*

Under Shannon's Code, section 3672, making the use of the words "heirs and assigns" unnecessary, the failure to use the word "assigns," in a deed conveying a separate estate and imposing a restraint on alienation, would not defeat the surviving husband's right to a tenancy by curtesy. *Ib.*

14. *Curtesy. Wife's separate estate. Construction of deed.*

The words "and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry," in a deed creating a separate estate in a wife, did not by the use of the word "heirs" import a purpose to cut off a right to a tenancy by curtesy in the surviving husband. *Ib.*

HUSBAND AND WIFE.

HUSBAND AND WIFE— Continued.

15. *Curtesy. Requisites. Release by death of issue.*

Where all the requisites of a tenancy by curtesy have existed, the husband is entitled to curtesy on surviving his wife, although all issue have died. *Ib.*

16. *Witnesses. Competency. Objections. Time.*

The defendant in a criminal case should object to the offer of his wife as a witness against him when she is first offered. *McCormick v. State*, 218.

17. *Witnesses. Privilege.*

Acts 1915, chapter 161, making the husband and wife competent witnesses for or against each other in criminal cases, does not destroy the rule that communication between them by virtue or in consequence of the marital relation, or any confidential communications between them, are inadmissible. *Ib.*

18. *Witnesses. Confidential relations. Time for objections.*

An objection by one accused of crime to a question asked his wife as witness, before the answer, because calling for confidential matter arising out of the marital relation, was properly and seasonably made. *Ib.*

19. *Witnesses. Privileged writings.*

The general rule is that letters between spouses are privileged, falling within the privilege for confidential communications which prevails between husband and wife. *Ib.*

20. *Deeds. Effect.*

A deed made directly by the husband to the wife creates in her a separate estate. *Scruggs v. Mayberry*, 586.

21. *Perpetuities. Deeds. Effect.*

Where the husband conveyed land to the wife, the deed providing that neither should dispose of it during the life of the other, but that the husband should be entitled to control and manage it, the husband became the wife's trustee for her separate estate, such a restraint on the power of alienation being void if the estate is general, but not if the estate is the separate one of the wife. *Ib.*

22. *Deeds. Effect.*

Under a deed from the husband to the wife, he to retain the use and possession of the property, but neither to have the right to dispose of it, and in the event of his death, the wife to control and manage the property, and in the event of her death after the grantor's death, the property to be divided among the children, and in the event of her death during the life of the grantor, the conveyance to be void, the wife has an estate only during the joint lives of herself and husband, and the interest of the children under the deed is contingent only. *Ib.*

 INJUNCTION BOND—INJUNCTIONS.

HUSBAND AND WIFE—Continued.

23. *Deeds. Effect.*

Such a deed conveys an estate *in praesenti*, the interest of the wife being immediate. *Ib.*

24. *Parties. Joinder. Antagonistic interests.*

That a husband and wife have under a will various interests in property, the extent of which in either of them depends upon his survival of the other, does not make them antagonistic so as to make their joinder as plaintiffs improper. *Ib.*

25. *Quieting title. Right to remedy. Title of plaintiff.*

Where the husband conveyed land to the wife subject to divestiture should she predecease him, and to the limitation that he should control and use the land during his life, they were both proper parties to sue to remove a cloud from the title, the equitable title being in her and the legal in him. *Ib.*

INJUNCTION BOND.

Enforcement.

Though an injunction bond was conditioned that, if complainant should pay such damages and costs as might be awarded by the chancery court in dismissing the bill, it should be void, but otherwise remain in full force, instead of following Shannon's Code, section 6257, declaring that, if the object be to enjoin a money demand after judgment, the penalty of the bond shall be double the judgment or sum sought to be enjoined, the condition of the bond was such that liability could be predicated thereon. *Martin Furn. Co. v. Massey*, 338.

INJUNCTIONS.

1. *Foreign courts. Injunction against proceedings. Relief. Equitable remedies.*

The courts of the forum may restrain a citizen of the State of the forum from prosecuting a suit against a citizen of the same State in a foreign State. *American Express Co. v. Fox*, 489.

2. *Relief. Right to.*

Defendant, a resident of Tennessee, will not be enjoined from suing a complainant in the State of Mississippi on a cause of action arising in Tennessee, because it would be to complainant's convenience to be sued in Tennessee, or because the rules of law in Mississippi are slightly different, from probably the laws of Tennessee would be applied, and such an injunction should be granted only in a very special case, and not one merely where the practice in two States differed. *Ib.*

3. *Relief. Right to.*

The courts of the forum will not at the suit of a nonresident corporation which might remove a suit brought by a resident of the State to the federal courts, enjoin a resident from suing in a foreign State, for such corporation could not be compelled to submit to the jurisdiction of the local courts. *Ib.*

 INNOCENT PURCHASER—INSTRUCTIONS.

INJUNCTIONS—Continued.

4. *Dissolution. Dismissal of bill.*

There was no error in dismissing a bill upon a hearing to dissolve a preliminary injunction, where the parties treated the cause as if submitted on bill, answer, and proof. *Lea v. Railroad*, 560.

5. *Eminent domain. Remedies of owner. Failure to institute condemnation proceedings.*

Where defendant railroad company had the right to condemn complainant's fee interest in a highway, and had already taken possession of it, complainant could not enjoin completion of the work, although no condemnation proceedings had been started. *Id.*

INNOCENT PURCHASER.

Equity. Bill of review. Collateral attack.

The rights of an innocent purchaser under a decree could not be interfered with, either by a bill of review for error apparent or an original bill in the nature of a bill. *Travis v. Sitz*, 156.

INSTRUCTIONS.

1. *Highways. Frightening mule. Action against automobile owner. Statute.*

In an action against an automobile owner for injuries to plaintiff on a highway, where the court charged that, if defendant failed to comply with Acts 1905, chapter 172, section 1, requiring the registration of automobiles, his conduct was negligence *per se*, and that, if an injury resulted to plaintiff by reason of such negligence and the wrongful act of defendant in violating the statute, the latter was liable for damages, also that, if he had the machine registered, he had a right to operate it, but, if it was not registered, he was liable for damages caused directly or proximately by its being operated along the public highway, such instruction was erroneous as leading the jury to conclude that defendant was liable if the mule drawing plaintiff's buggy took fright at the automobile, injury resulting consequently at a time when the automobile was on the public highway and not registered in defendant's name whether the defendant was or was not negligent in the management of the automobile under the common law or sections 3 and 4 of the act. *Black v. Moree*, 73.

2. *Appeal and error. Harmless error.*

In an action against a railway for injuries, where, under all the evidence, there was no material issue of fact for the jury to determine on the question of defendant's negligence, error in charging the doctrine of *res ipsa loquitur* was harmless. *Memphis St. Ry. Co. v. Cavell*, 462.

3. *Libel and slander. Words imputing larceny.*

In slander action it was error to direct a verdict for defendant on the ground he had not imputed larceny to plaintiff, where he roughly said to plaintiff, a customer in his store, in the presence of others,

INSURANCE—INTOXICATING LIQUORS.

INSTRUCTIONS—Continued.

that a hat was stolen from the store, that the hat on her head looked very much like it and was the hat, that he had been trying to locate the hat for some time by detectives, and they had located it on her head, and she replied that she had never been accused of stealing before, and no denial of the meaning of his words as defined by this reply was made by him. *Bowker v. Marcantile Co.* 478.

INSURANCE.

1. *Life policies. Statutes. Construction. Not in good faith.*

In acts 1901, Chapter 141, section 1, as to penalties for refusing to pay a policy, the words "not in good faith," are antithetical to "in good faith," and imply a lack of good or moral intent as the motive for refusal to pay the loss. *Sullivan v. Life Ins. Co.*, 646.

2. *Life policies. Refusal to pay loss. Right to statutory penalty.*

Under such statute, the right to recover the penalty is conditional, and does not exist where the right to recover the face of the policy has been forfeited by failure to pay premiums, or where the refusal is in good faith. *Ib.*

3. *Life policies. Refusal to pay loss. Right to statutory penalty. Evidence.*

Evidence held insufficient to show that insurer's refusal to pay loss on life policy was not in good faith. *Ib.*

4. *Life policies. Refusal to pay loss. Right to statutory penalty. Evidence.*

In view of differences of opinion as to statutory construction and determinative facts, an insurer is not necessarily liable. For refusal to pay a loss as made in bad faith, on the ground that its attorneys should have known the law fixing liability on the policy. *Ib.*

INTERSTATE COMMERCE.

See COMMERCE.

INTOXICATING LIQUORS.

1. *Illegality. Right of action for price.*

Mere knowledge on the part of a seller of intoxicants that the buyer intends illegally to resell the liquors will not render the contract void, so as to bar the seller's action for the purchase price, though if the seller participates in or contributes to the purchaser's intention to sell illegally, or does any act to facilitate or further the design to transgress the law, or has an interest therein, the right to recover the price is lost. *Jones & Co. v. Wilkins*, 146.

2. *Sale of intoxicating liquors. Recovery of price. Statute.*

Where the seller of liquors knew through its local agent that the buyer was running a wide-open liquor saloon in violation of law, and made the shipment to a transfer company, not to the consignee, marked merely with his initials, so that the public would

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—Continued.

not know to whom it was to be delivered, such seller could not recover the price, having aided the buyer's design to transgress the law and circumvented the legislature's object in passing Acts (Ex. Sess.) 1913, chapter 1, requiring common carriers to cause all consignees of liquor to sign, before delivery, an affidavit setting out his name, etc. *Ib.*

3. *Evidence. Internal revenue license. Statute.*

Acts 1903, chapter 355, making the payment of an internal revenue special tax as a retail liquor dealer *prima facie* evidence of sales within the law prohibiting sales of liquor within four miles of a schoolhouse, and Acts 1909, chapter 384, providing that in all prosecutions for violations of the law against the sale of intoxicating liquors copies of the records in the office of the internal revenue collector, showing defendant's payment of an internal revenue special tax as a liquor dealer, or the issuance of an internal revenue special tax stamp, when certified by the revenue collector, shall be competent evidence, are drastic and in derogation of the common-law rights of the citizen, and must not be too liberally construed against the citizen. *Elmore v. State*, 347.

4. *Offense. Issues and proof. Schoolhouse.*

In a prosecution for selling liquor within four miles of a schoolhouse the existence of a schoolhouse, where school is ordinarily kept within four miles of defendant's place of business, is a fact which must be averred in the indictment and proven on the trial, notwithstanding Acts 1909, chapter 1, which extended the four-mile law to the whole state. *Ib.*

5. *Illegal sales. Fraternal club.*

One directing the dispensing of intoxicating drinks as "president" of a club composed mostly of drinkers, the front door of which was kept locked, and the glass panels thereof kept opaque by deep paint, the members entering by a side door from a dark unlighted alley, they being sworn to secrecy and paying for the expenses and "president's" salary by proceeds of coupon books for liquor payments, the club having obtained a federal retail liquor license, held guilty of violation of the law, forbidding selling intoxicating liquor within four miles of an institution of learning. *Montgomery v. State*, 577.

6. *Prosecutions. Presumptions.*

In prosecution for illegal retail liquor selling, by statute there is a presumption of guilty arising from the possession of a United States internal revenue license for the retail sale of intoxicating liquors. *Ib.*

7. *Arrest. Arrest without warrant. Threatened unlawful sale of intoxicating liquors.*

While mere possession of intoxicating liquors in any quantity is not unlawful, it is a breach of the peace for one having liquors to prepare for sale thereof, that being a threat to violate the law against sales. *State ex rel. v. Reichman*, 653.

JUDGES.

INTOXICATING LIQUORS— Continued.

8. *Arrest. Arrest without warrant. Threatened sale of liquors.*

The right of the sheriff to arrest without warrant for threatened unlawful sale of intoxicating liquors and to close the place of business is not unlawful as an arbitrary invasion of property rights, which are not more sacred than the person, which may be seized to prevent breach of peace. *Ib.*

9. *Sheriffs and constables. Duties. Compensation.*

The requirement that the sheriff, to prevent breaches of the peace, arrest one who threatens unlawful sale of intoxicating liquors and if necessary close his place of business, is not subject to the objection of requiring services without compensation. *Ib.*

10. *Sheriffs and constables. Duties of sheriff. Investigations.*

The duty of the sheriff, having notice of commission of an offense being to prevent or suppress it, involves the duty to at least make some investigation, and it is not necessary in case of unlawful sales of intoxicating liquors, for the sheriff to actually see sales before swearing out warrants. *Ib.*

11. *Offenses. Statutory provision.*

Shannon's Code, Sec. 993, subsec. 2, requiring every applicant for a liquor license to give bond to keep a peaceable and orderly house, is a legislative declaration that the liquor law is intended to preserve the peace, so that any violation thereof is a breach of the peace. *State v. Reichman*, 685.

12. *Offenses. Nuisance. Breach of the peace.*

Engaging in the sale of intoxicating liquors, declared by Act 1913 (2d Ex. Sess.) chapter 21, to be a nuisance, is among that class of nuisances always treated by the court as tending to disturb the peace and good order of the community. *Ib.*

13. *Offenses. "Disorderly house."*

A saloon run in violation of law is a "disorderly house," which is defined as any place where illegal practices are habitually carried on; and hence a saloon open, equipped, and ready for business is a threat to breach the peace, if not in itself a breach of the peace. Citing Words & Phrases, Second Series, Disorderly House. *Ib.*

14. *Sheriffs and constables. Powers and duties. Arrest.*

On making an arrest for a threatened violation of the liquor law, the sheriff should take such steps as are necessary to prevent the threatened sales, as, in case of a saloon open for business, by closing it till the liquors are removed, and then release the offender and leave future sales and future threats to be dealt with as they arise. *Ib.*

JUDGES.

1. *Appointment. Powers of legislature.*

Although Const. art. 11, sec. 17, provides that no county office of legislative creation shall be filled otherwise than by the people or the county court, the legislature may under article 7, sec. 4,

JUDGMENT.

JUDGES—Continued.

providing that the election of all officers and filling of all vacancies not otherwise provided for by Constitution shall be made as the legislature may direct, provide as by Priv. Laws 1915, ch. 78, sec. 12, that the office of judge of the criminal court of Dyer county be filled by appointment until the next general election. *Hodge v. State*, 525.

2. *Clerks of courts. Holding two offices. "Lucrative office."*

Priv. Laws 1915, ch. 78 secs. 4, 12, providing that the judge of the county court of Dyer county shall act as judge of the criminal court created by the act, and the clerk of the circuit court as clerk of such criminal court, does not violate Const. art. 2, sec. 26, providing that no person shall hold more than one "lucrative office," since the act expressly provides that there shall be no shall be no compensation therefor. *Ib.*

3. *Appointment. Powers of legislature.*

Under Priv. Laws 1915, ch. 78, sec. 12, providing that the county judge of Dyer county shall act as judge of the criminal court in that county, no express appointment of such judge to the new office is necessary; the act itself being sufficient authority. *Ib.*

4. *Statutes. Certainty. Intent of legislature.*

Priv. Laws 1915, ch. 78, sec. 12, providing that the "judge of the court" of Dyer county shall be judge of the criminal court, and receive no other compensation than provided by law for said county judge, clearly shows that the county court was intended, and is not objectionable for omission of "county" before the words "court of Dyer county." *Ib.*

JUDGMENT.

1. *Notwithstanding verdict. Party entitled to move.*

Where a case had been submitted to the jury and judgment entered on a verdict for the plaintiff, a judgment *non obstante verdicto* for the defendant rendered by the trial judge, at the request of the defendant, was error. *Neill v. Insurance Co.*, 28.

2. *Collusive decree. Effect.*

A collusive decree between husband and wife can be treated, as to third parties, only as a deed between them. *Travis v. Sitz*, 156.

3. *Collusive decree. Construction of deed.*

A collusive decree, obtained by a husband and wife concerning the validity of a deed, or of any clause thereof, filed against persons who on the face of the bill had no interest in the controversy, will be treated as to third persons only as a deed between the husband and wife. *Ib.*

 JURISDICTION—LAND AND LAND TITLES.

JURISDICTION.

1. *Trusts. Removal of trustee. Statute.*

The chancery court has jurisdiction, under Shannon's Code, sections 5414, 5422, to remove a trustee for the causes enumerated in the statute and "for other good cause" at suit of the beneficiary. *Maydicell v. Maydicell*, 1.

2. *Husband and wife. Wife's separate estate. Restraint on alienation. Power of court.*

Where a bill was filed by the husband and wife in substantially an *ex parte* proceeding for the purpose of obtaining leave of the chancellor to violate a clause restraining alienation in a deed creating a separate estate in the wife, the chancellor was without jurisdiction of the subject-matter, and his decree was inoperative. *Travis v. Sitz*, 156.

LACHES

See FRAUD.

LAND AND LAND TITLES.

1. *Husband and wife. Wife's separate estate. Conveyance creating.*

In a conveyance of real estate to a daughter, to take effect after the death of the grantor and his wife, the words "to have and to hold said tract of land to the said L. H. and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry, and not to be liable to be sold for the debts of any husband she may have if she ever marries," created a separate estate, without the aid of a clause restraining alienation. *Travis v. Sitz*, 156.

2. *Husband and wife. Wife's separate estate. Statute.*

Shannon's Code, sections 4234, 4325, providing that there can be no lispossession of the husband or wife on a sale under execution of the husband's interest in the wife's general real estate during the life of the wife, that it cannot during her life be aliened by the husband, and Acts 1879, chapter 141, reducing the husband's rights of curtesy in the wife's land, have no bearing on the inferences to be drawn from the language of a deed showing an intention to create a separate estate in the wife. *Ib.*

3. *Perpetuities. Restraint on alienation. Wife's separate estate.*

A deed to a daughter, creating a separate estate, providing that the land was given without power of disposal in any way, and not to be liable to be sold for her debts or the debts or liabilities of any husband, was not invalid as a restraint on alienation. *Ib.*

4. *Husband and wife. Wife's separate estate. Statute.*

Acts 1913, chapter 26, removing the disabilities of coverture in respect of married women, and practically making their estates separate, does not interfere with or disturb the creation or operation of equitable separate estates, since the removal by the statute of the wife's disabilities increased rather than diminished the necessity for such estates. *Ib.*

 LAND AND LAND TITLES.

LAND AND LAND TITLES—Continued.

 5. *Deeds. Rights of heirs. separate estate of wife.*

Under a deed creating a separate estate in a wife, her children could have no interest, save as her heirs at law. *Ib.*

 6. *Husband and wife. Separate estate of wife. Conveyance.*

The rule that a married woman will not be permitted in a court of equity to disaffirm a voidable sale made by her, the consideration of which has been paid directly to her, except on condition that she refund the purchase money, or that it be declared a lien on the property, does not apply where the sale has been made in violation of a restraint on alienation. *Ib.*

 7. *Husband and wife. Separate estate of wife. Conveyance.*

Where a married woman disaffirms a sale made by her of her separate estate, voidable because of a restraint on alienation, she may recover such rents accruing from the date when she surrendered possession. *Ib.*

 8. *Descent and distribution. Right of heirs. Wife's separate estate.*

Where a sale by a married woman of property constituting her separate estate is void because of a restraint on alienation, although her heirs at law cannot recover rents accruing before her death, in the absence of a tenancy by curtesy in the surviving husband, they could recover for rents not in arrears at her death. *Ib.*

 9. *Boundaries. Controlling elements.*

The general rule that resort is, first, to natural objects or land-marks; second, to artificial monuments; third, to lines of adjacent owners; and last, to courses and distances—is not inflexible or absolute. *Pritchard v. Rebert, 328.*

 10. *Boundaries. Controlling elements. Monuments.*

There is no magic in a monument called for so as to make it control invariably, but it controls only when regarded as more certain than course or distance. *Ib.*

 11. *Boundaries. Controlling elements. Adjacent boundary.*

A mere adjacent boundary line would yield more readily to course and distance than an artificial monument. *Ib.*

 12. *Boundaries. Controlling elements.*

The rule that course and distance yield to monuments or adjacent boundary lines is usually applied in fuller force to large boundaries of land in the country, and with less potency in towns or cities. *Ib.*

 13. *Boundaries. Controlling elements.*

In deeds to city property, where courses and distances were intended by the parties to control, they will be given that effect. *Ib.*

 14. *Covenants. Covenants running with land. Binding force..*

Covenants running with the land bind even purchasers at sales in *inritum*. *Land Co. v. Interurban Co., 353.*

LAND AND LAND TITLES.

LAND AND LAND TITLES—Continued. ,

15. *Deeds. Estates on condition. Creation.*

While the words "this conveyance is upon the condition" are usually held to create an estate on condition, they do not necessarily create one, but may be so controlled by other words in the instrument as to fail of that effect. *Ib.*

16. *Deeds. Estates on condition. Creation.*

The words relied on as creating the condition on which an estate depends must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it, and a condition may be created by reference to a condition contained in another instrument, as by reference in a deed to an agreement to convey, with recital that the deed is made pursuant thereto. *Ib.*

17. *Mines and minerals. Title. Adverse possession. By possession of surface.*

Possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface, is not a possession of the underlying severed mineral interest, nor does such possession inure to the owner of the mineral; distinct estates being created by the severance. *Northcutt v. Church*, 541.

18. *Adverse possession. Tacking. Privity.*

Where the grantee of an adverse possessor takes possession, he may unite his subsequent possession with his grantor's prior possession to make out adverse possession for the seven-year period. *Ib.*

19. *Mines and minerals. Title. Adverse possession. Tacking.*

Where the grantee of mineral rights of an adverse possessor takes immediate and appropriate possession thereof, he may unite his subsequent possession with his grantor's prior possession to make out statutory title by adverse possession. *Ib.*

20. *Wills. Construction. Estates created.*

A will devising land to the son without mention of heirs or children or character of estate is a direct devise in fee. *Scruggs v. Mayberry*, 586.

21. *Wills. Construction. Estates created.*

A will devising lands to the wife during her life and on her death to the son and the heirs of his body, but if he should die without heirs, to his sister, and the heirs of her body, is a direct devise in fee to the son, since at common law such a devise would be an estate tail, and under Shannon's Code, sec. 3673, all such estates are made estates in fee simple. *Scruggs v. Mayberry*, 586.

22. *Wills. Construction. Estates created. Limitations.*

Where a devise of a fee simple is followed by condition that if the devisee should die without heirs the land should go to his

LAND AND LAND TITLES.

LAND AND LAND TITLES—Continued.

sister, it is not impaired by such limitation where the devisee survives the testator, since, to invoke the limitation, the devisee must lie before the testator's death. *Ib.*

23. *Wills. Construction. Estates created.*

Where a devise of the fee is followed by a devise over in case the devisee dies without issue or without children, or without heirs of the body, to invoke the limitation, the death of the devisee must occur prior to that of the testator. *Ib.*

24. *Wills. Construction. Conflict in rules.*

The rule (Shannon's Code, sec. 3675) that where a devise of the fee is followed by devise over if the devisee dies without issue, to invoke the limitation the devisee's death must occur prior to that of the testator, and the rule that if a life estate is granted with unlimited power of disposition of the whole estate and remainder created in the same property, the latter is void, are not in conflict. *Ib.*

25. *Wills. Construction. Estates created. Power of disposition.*

Powers merely incidental and to be inferred from the fact of ownership are not the unlimited or absolute power of disposition which, if given to a life tenant, makes a subsequent remainder void, but such absolute power must be given in express terms or impliedly by added words. *Ib.*

26. *Wills. Estates created. Particular words.*

The rule that where a devise of the fee is followed by a devise over if the devisee dies without issue, to invoke the second devise the devisee must predecease the testator, applies even where at the time of making the will the devisee was only eight years old, and the testator died within one year thereafter. *Ib.*

27. *Wills. Estates created. Devises over.*

Where the devise is to a son and to his children, although they are not yet in being and may never be, it is the preferred construction that the son takes the life estate with remainder to the children. *Ib.*

28. *Wills. Estates created. Remainders.*

The devise to a son and to his children, and if he dies without children then to his sister and her children, creates a life estate in the son with remainder to the children, and at birth of a child the remainder would vest, subject to open and let in after-born children. *Ib.*

29. *Wills. Construction. Technical words. "Heirs of the body."*

When technical words are used in a will they are presumed to be used in a technical sense, and before another meaning can be attached to them that meaning must clearly appear, so that unless it clearly appears that the testator used the words "heirs of the body" as meaning children, they will not be so construed. *Ib.*

 LANDLORD AND TENANT.

LAND AND LAND TITLES—Continued.

 30. *Wills. Construction. Technical words. Rules of property.*

Since Shannon's Code, sec. 3673, making all estates tail fee-simple estates, creates a rule of property, its application ought not to be rendered difficult by a latitudinarian construction of familiar words, the technical significance of which uniformly creates an estate tail at common law. *Ib.*

 31. *Wills. Construction. Particular words.*

Provisions of will held not to indicate that the words "heirs of the body" were intended to be used in other than the technical significance. *Ib.*

 32. *Husband and wife. Perpetuities. Deeds. Effect.*

Where the husband conveyed land to the wife, the deed providing that neither should dispose of it during the life of the other, but that the husband should be entitled to control and manage it, the husband became the wife's trustee for her separate estate, such a restraint on the power of alienation being void if the estate is general, but not if the estate is the separate one of the wife. *Ib.*

 33. *Husband and wife. Deeds. effect.*

Under a deed from the husband to the wife, he to retain the use and possession of the property, but neither to have the right to dispose of it, and in the event of his death, the wife to control and manage the property, and in the event of her death after the grantor's death, the property to be divided among the children, and in the event of her death during the life of the grantor, the conveyance to be void, the wife has an estate only during the joint lives of herself and husband, and the interest of the children under the deed is contingent only. *Ib.*

 34. *Husband and wife. Deeds. Effect.*

Such a deed conveys an estate *in praesenti*, the interest of the wife being immediate. *Ib.*

 35. *Divorce. Decree. Vested and contingent interests.*

A decree in a divorce case operating as a deed and describing a vested remainder interest in lands conveys nothing where the sole interest is a contingent remainder, and is not cured by a further description including any other property or estate of the defendant. *Ib.*

 36. *Divorce. Decree. Vested and contingent interests.*

A decree attempting to convey a contingent remainder is of no effect since an instrument purporting to convey such an interest amounts only to an agreement to convey which may be enforced when the contingency happens. *Ib.*

See CURTESY.

LANDLORD AND TENANT.

 1. *Leases. Legality of object.*

Where a lease of a building does not itself set forth an illegal intent or use, and where nothing else appears, the lessor is not

 LAWS 1913—LEGISLATIVE INTENT.

LANDLORD AND TENANT—Continued.

barred from recovery of rent by his knowledge that the tenant intends to put the premises to illegal use. *Bank of Com. & Trust Co. v. Burke*, 19.

 2. *Leases. Legality of object.*

Although a lease of a building does not itself set forth any illegal intent or use, if the lessor at the time of leasing knows and intends that the premises shall be used for an illegal purpose, such as prohibited sales of intoxicating liquor, and he does anything in furtherance of the transgression, he cannot recover rent. *Ib.*

 3. *Leases. Legality of object. "Storehouse."*

Where a building had long been occupied as a saloon, was so outfitted, was offered for rent as peculiarly valuable for a saloon business, and after the leasing was used for a saloon by the lessee and sublessee with the knowledge of the agents of lessors, although it was leased in terms for use as a "storehouse," lessors could not recover rent (citing words and Phrases, First Series, Storehouse). *Ib.*

 4. *Leases. Legality of object.*

If premises be leased for lawful purposes, the mere noninterference by landlord with subsequent illegal traffic of his tenant, after becoming aware of it, does not involve him in the tenant's guilt as showing participation. *Ib.*

 5. *Actions for rent. Evidence of illegal use of premises.*

Acts of the parties to the lease, before and after its making, may be proven to show their intent in making it. *Ib.*

 6. *Premises. Injuries from defects. Employee of tenant.*

Where the landlord has agreed to keep the premises in repair, and after notice neglects to do so, he will be liable to an employee of the tenant who is injured by the defect. *Cotton Press & Storage Co., v. Miller*, 187.

LAWS 1913.

Sheriffs and constables. Breach of duties. Defenses. *State ex rel. v. Reichman*, 653.

LEASES.

See CONTRACTS.

LEGISLATIVE INTENT.

See STATUTES AND STATUTORY CONSTRUCTION.

 LEGISLATIVE POWER—LIABILITY.

LEGISLATIVE POWER.

1. *Taxation. Legislative power to levy local taxes.*

In the absence of constitutional restriction, the legislature has plenary power to levy taxes for local purposes. *Quinn v. Hester*, 373.

2. *Constitutional law. Legislative power. Policy.*

The power of legislature is limited only by the Constitution, and its acts cannot be declared unconstitutional merely for reasons of policy. *Ib.*

3. *Courts. Establishment. Powers of legislature. "Inferior courts."*

Priv. Laws 1915, ch. 78, establishing a criminal court in Dyer county and prescribing its jurisdiction, within the power conferred on the Legislature by Const. art. 6, sec. 1, declaring the judicial power shall be vested in the supreme court and in such circuit, chancery, and other inferior courts as the legislature shall ordain and establish, since the new court is an "inferior court." *Hodge v. State*, 525.

4. *Judges. Appointment. Powers of legislature.*

Although Const. art. 11, sec. 17, provides that no county office of legislative creation shall be filled otherwise than by the people or the county court, the legislature may under article 7, sec. 4, providing that the election of all officers and filling of all vacancies not otherwise provided for by Constitution shall be made as the legislature may direct, provide as by Priv. Laws 1915, ch. 78, sec. 12, that the office of judge of the criminal court of Dyer county be filled by appointment until the next general election. *Ib.*

5. *Clerk of courts. Appointment. Powers of legislature.*

Priv. Laws 1915, ch. 78, sec. 4, providing that the clerk of the circuit court of Dyer county shall be clerk of the criminal court of such county, does not violate Const. art. 6, sec. 13, requiring that clerks of inferior courts be elected by the voters every four years. *Ib.*

6. *Clerks of courts. Judges. Establishment of offices. Statutes. Validity.*

Priv. Laws 1915, ch. 78, being intended to relieve the circuit court of Dyer county of certain duties, properly provides by sections 4, 12, that the judge of the county court and clerk of the circuit court shall perform the duties of the criminal court established by the act, and it is unnecessary that a new judgeship and clerkship be established. *Ib.*

7. *Judges. Appointment. Powers of legislature.*

Under Priv. Laws 1915, ch. 78, sec. 12, providing that the county judge of Dyer county shall act as judge of the criminal court in that county, no express appointment of such judge to the new office is necessary; the act itself being sufficient authority. *Ib.*

LIABILITY.

1. *Theaters and shows. Liability for uncivil conduct towards patrons.*

The proprietor of a place of amusement is required to exercise civil conduct toward those he permits to enter and remain on his prem-

 LIABILITY.

LIABILITY—Continued.

ises, and is liable in tort for breach of this duty. *Boswell v. Barnum & Bailey*, 35.

2. *Highways. Frightening mule. Liability of automobile owner. Statute.*

Where defendant's automobile was not registered as required by Acts 1905, chapter 173, when he operated it on the highway, and his failure to register it had no connection with and in no way caused the frightening of plaintiff's mule, which tipped over her buggy and injured her, defendant's failure to register his car alone, without negligence in its operation, did not render him liable to plaintiff; as the statute discloses no purpose to make failure to comply with its first section, requiring registration, the ground of liability of the owner of an automobile for any further sum than the fine of \$25 to \$100 prescribed by section 6. *Black v. Moree*, 73.

3. *Principal and surety. Fidelity bonds. Proofs of loss.*

Under such bond, providing that the insurer at the expiration of three months after satisfactory proof would pay its liability, and that on the discovery of any act which might result in a claim the insured should as soon as possible give notice to the insurer in writing, and should within three months after the discovery of the default furnish the insurer reasonable particulars and proofs of the correctness of the claim, and declaring that the bond should be void if the employer failed to give such notice, but not providing that a failure to make proofs of the correctness of the claim should forfeit the bond, the allegation of a claim duly made showed that the complaint as the commencement of the action was filed after the lapse of such three months' period. *Green v. Fidelity & Guaranty Co.*, 117.

4. *Principal and surety. Fidelity bonds. Denial of liability. Time to use. Waiver.*

A denial of its liability on its fidelity bond made when notice of a claim was given waived the provision of the bond tending to render the suit premature, if brought before the expiration of three months after proof of loss. *Ib.*

5. *Landlord and tenant. Premises. Injuries from defects. Employee of tenant.*

Where the landlord has agreed to keep the premises in repair, and after notice neglects to do so, he will be liable to an employee of the tenant who is injured by the defect. *Cotton Press & Storage Co. v. Miller*, 187.

6. *Injunction. Bonds. Enforcement.*

Though an injunction bond was conditioned that, if complainant should pay such damages and costs as might be awarded by the chancery court in dismissing the bill, it should be void, but otherwise remain in full force, instead of following Shannon's Code, section 6257, declaring that, if the object be to enjoin a money demand after judgment, the penalty of the bond shall be double the judgment or sum sought to be enjoined, the condition of the

LIABILITY.

LIABILITY—Continued.

bond was such that liability could be predicated thereon. *Martin Furn. Co. v. Massey*, 338.

7. *Master and servant. Injuries to third persons. Independent contractor.*

The employer is liable for the negligence of an independent contractor or his employees where he might have anticipated the injury as a direct or probable consequence of the failure to exercise reasonable care in the course of the work. *Smith v. Bank & Trust Co.*, 398.

8. *Master and servant. Injuries to third persons. Independent contractor.*

Where plaintiff while walking on street outside of covered sidewalk was struck by a hot rivet which was dropped by an employee of an independent contractor constructing a building, the owner of such building was not liable, the negligent act being only an incidental or collateral detail of the work and not a necessary or natural result which the owner might reasonably have anticipated. *Ib.*

9. *Master and servant. Injuries to third persons. Independent contractor.*

That the owner of a building in process of construction required an independent bond from the contractor, does not in any way render the owner liable for negligence of the contractor. *Ib.*

10. *Banks and banking. Liability of acts of cashier.*

A bank and its receiver in insolvency are bound by the act of its cashier in issuing drafts and by the admission of value received contained in such drafts, in the absence of proof that the payee had actual or constructive knowledge of the fraud of the cashier or the falsity of such admission. *Pemiscot County Bank v. Wilson-Ward Co.*, 426.

11. *Banks and banking. Liability of bank for wrongful acts of cashier.*

The payee of a draft, knowing that the cashier of the bank of issue was interested in the firm for whose debt the draft issued, and was secondarily liable for such debt, but believing the debtor firm to be solvent, is not charged with notice that the draft was issued through fraud of the cashier or that the bank received no consideration therefor, and such payee cannot be compelled to reimburse the bank. *Ib.*

12. *Banks and banking. Liability of bank for wrongful acts of cashier.*

A bank may not hold its officers as worthy of confidence, and yet reap profits from frauds which they are thereby enabled to perpetrate. *Ib.*

13. *Negligence. Res ipsa loquitur.*

In general, mere proof that an accident injurious to plaintiff has occurred does not justify a verdict or judgment imposing liability therefor upon the defendant. *Memphis St. Ry. Co. v. Oovell*, 462.

LIBEL AND SLANDER—LIEN.

LIABILITY—Continued.

14. *Insurance. Life policies. Refusal to pay loss. Right to statutory penalty. Evidence.*

In view of differences of opinion as to statutory construction and determinative facts, an insurer is not necessarily liable. For refusal to pay a loss as made in bad faith, on the ground that its attorneys should have known the law fixing liability on the policy. *Silliman v. Life Ins. Co.*, 646.

See MASTER AND SERVANT.

LIBEL AND SLANDER.

Words imputing larceny.

In slander action it was error to direct a verdict for defendant on the ground he had not imputed larceny to plaintiff, where he roughly said to plaintiff, a customer in his store, in the presence of others, that a hat was stolen from the store, that the hat on her head looked very much like it and was the hat, that he had been trying to locate the hat for some time by detectives, and they had located it on her head, and she replied that she had never been accused of stealing before, and no denial of the meaning of his words as defined by this reply was made by him. *Bowker v. Mercantile Co.* 478.

LICENSE.

See THEATRES.

LIEN.

1. *Attorney and client. Issuance of summons.*

Acts 1899, chapter 243, provides by sections 1 and 2 that attorneys of record who begin a suit in a court of record shall have a lien upon plaintiff's right of action from the filing of the suit, and that any attorney who is employed to prosecute a suit already brought shall have a lien on plaintiff's right of action from the date of his employment, provided, the record will first be made to show such employment by notice on the rule docket of such court or written memorandum filed with the papers in the case or notice served on defendant. Shannon's Code, sections 4445, 4518, declare that all civil actions in courts of record are commenced by summons. Defendant compromised an action by plaintiff before summons was served. *Held*, that until service of summons or some other notice of institution of the suit, plaintiff's counsel had no lien which he could assert against defendant. *Steel Const. Co. v. Walker*, 55.

2. *Conditional sales. Lien for automobile injury. Priorities. "Deodand."*

The lien on an automobile, given by Laws 1905, ch. 173, sec. 5, to a person injured thereby in collision, is inferior to a conditional vendor's rights therein fixed before the collision, and only the interest of the vendee is subject to such lien; and the doctrine of "deodand" (by which is meant the forfeiture of a

MARRIED WOMEN— MASTER AND SERVANT.

LIEN—Continued.

personal chattel, animate or inanimate, becoming the immediate instrument causing death) does not apply, especially in view of Const. art. 1, sec. 12, providing that "if any person be killed by casualty, there shall be no forfeiture in consequence thereof;" and since the legislative policy has been consistently to protect the lien for the price. *Parker-Harris Co. v. Tate*, 509.

3. *Statutory. Priorities.*

A lien created by statute does not take precedence of a prior contractual lien, unless such is the clear intention of the statute, even when the statutory lien is for work done on or to the betterment of the property in question. *Ib.*

4. *Statutory.*

A statutory lien has only such force as the statute gives it and the superseding or subordinating of an earlier lien, by the statute creating a lien, should not easily be inferred, especially where the statutory lien is not awarded for service adding value to or preserving the property in question. *Ib.*

5. *Priorities.*

In the absence of express statute to the contrary, liens take precedence in the order of time. *Ib.*

6. *Statutes. Construction. "Owner."*

Where the same word used in a statute more than once, and the meaning is clear at one place, it will ordinarily be construed to have that meaning elsewhere in the act, and the word "owner," as used in Laws 1905, ch. 173, refers to the conditional vendee who has control and use of the automobile, and not to the conditional vendor. *Ib.*

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Theaters and shows. Injuries to persons attending. Acts of employee.*

Circus ushers, in acting uncivilly towards patrons in assigning seats, though acting in excess of their authority, held to be acting within the general scope of their authority. *Boswell v. Barnum & Bailey*, 35.

2. *Injuries to third persons. Independent contractor.*

The employer is liable for the negligence of an independent contractor or his employees where he might have anticipated the injury as a direct or probable consequence of the failure to exercise reasonable care in the course of the work. *Smith v. Bank & Trust Co.*, 398.

MECHANICS' LIEN.

MASTER AND SERVANT—Continued.

3. *Injuries to third persons. Independent contractor.*

Where plaintiff while walking on street outside of covered sidewalk was struck by a hot rivet which was dropped by an employee of an independent contractor constructing a building, the owner of such building was not liable, the negligent act being only an incidental or collateral detail of the work and not a necessary or natural result which the owner might reasonably have anticipated. *Ib.*

4. *Injuries to third persons. Independent contractor.*

That the owner of a building in process of construction required an independent bond from the contractor, does not in any way render the owner liable for negligence of the contractor. *Ib.*

5. *Acts of agent. Responsibility of principal.*

A master is liable for the acts of his servant within the scope of the servant's authority, to one injured, though such person did not bear any contractual relation to the master. *Railroad v. Marlin*, 435.

MECHANICS' LIEN.

1. *Purpose of statute. Construction.*

The intention of the legislature in enacting the mechanic's lien laws was to secure and protect the laborer in his wages, and thereby to promote and encourage improvements, and the act should be given a liberal construction so as to carry out such purpose. *Hotel Co. v. Construction Co.*, 305.

2. *Procedure. Construction.*

While the law is strict in its requirements that the claimant shall make it clearly appear that he has a lien, yet when that appears remedial laws for its enforcement are to be liberally construed. *Ib.*

3. *Bankruptcy. Discharge in bankruptcy. Statute.*

Under Bankrupt Act, July 1, 1898, chapter 541, section 67, cl. D, 30 Stat. 564 (U. S. Compt. St. 1913, section 9651), providing that liens given or accepted in good faith and for a personal consideration, which have been recorded according to law; if the record thereof is necessary to impart notice, shall not be affected by the act, and section 16 (section 9600), providing that the liability of a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the bankrupt's discharge, there was no intention to impair liens valid under the State laws, but to give the bankrupt personal immunity from his debts, leaving intact all liens existing prior to the bankruptcy in favor of his creditors, so that mechanics' liens upon the property of a hotel company in force more than four months prior to the contractor's adjudication in bankruptcy continued in force as against the property of the hotel company, after the contractor's discharge. *Ib.*

MINES AND MINERALS.

MECHANICS' LIEN—Continued.

4. *Pleading. Amendment. Limitations.*

In a suit to establish a mechanic's lien, complainant did not make the trustees under a prior mortgage parties before the expiration of the ninety days from the service of notice of lien. An amended bill in which the trustees were named as defendants was filed. In that bill the complainant prayed that the court determine the interest, if any, held by the trustees, and that if the mortgage be found a valid prior lien, complainant be permitted to subject the equity of defendants to the satisfaction of his claim. Shannon's Code, section 4495, declares that at any time before trial new parties may be added. *Held* that, as no relief was sought against the trustees, the notice required by section 3536, which is a condition precedent to a mechanic securing priority over the mortgage, not having been served, the amendment will be treated as relating back to the original bill, and the trustees cannot defeat the bill on the plea of limitation. *Niehous v. Construction Co.*, 382.

5. *Pleading. Amendment. Limitations.*

In such case the contractor and mortgagor cannot defeat the lien because the trustees of the mortgage, who held the legal title, were not brought in within the ninety-day period; for, while such parties were indispensable, yet, as no relief was sought against them, limitations do not apply any more than where the contractor is not originally made a party. *Ib.*

6. *Perfection of lien. Parties.*

- Where a prior mortgage on the premises upon which complainant sought a mechanic's lien had been discharged save as to a few mortgage bonds, the holders of which could not be discovered, and the amount of such had been deposited for payment, a mechanic's lien against the premises cannot be defeated because the trustees under the mortgage who yet held the legal title were not made parties within ninety days after serving notice as required by law; for in such cases the trustees were practically nominal parties. *Ib.*

MINES AND MINERALS.

1. *Title. Adverse possession. By possession of surface.*

Possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface, is not a possession of the underlying several mineral interest, nor does such possession inure to the owner of the mineral; distinct estates being created by the severance. *Northcut v. Church*, 541

2. *Title. Adverse possession. By possession of surface.*

Acts of possession required for the surface and those for the minerals are different; the latter requiring some form of mining or activities directly related thereto. *Ib.*

3. *Title. Adverse possession. Tacking.*

Where the grantee of mineral rights of an adverse possessor takes immediate and appropriate possession thereof, he may unite his

 MINORS—MORTGAGE.

MINES AND MINERALS— Continued.

subsequent possession with his grantor's prior possession to make out statutory title by adverse possession. *Ib.*

4. *Conveyance of legal rights. Right of access incident.*

The grantor of minerals by implication of law conveys the right to obtain access to them through the surface, and against such purpose does not hold the surface adversely. *Ib.*

MINORS.

Equity. Bill of review. Right to file.

A minor may file an original bill in the nature of a bill of review to question matters adjudged against him. *Travis v. Sitz*, 156.

MORTGAGE.

1. *Frauds, statute of. Real property. Description.*

A mortgage reciting the mortgagor's conveyance of "the following real estate," one house and lot and storehouse, bounded on the east by east alley, south by Third street, west by Broad street, north by Fourth street, containing the entire block between Third and Fourth streets, known in the plan of town as lots 53, 54, 55, and 56, and on default authorizing the mortgagee to sell the real estate at "Eaton, in Gibson county, Tennessee, at public sale," first advertising the sale by posters in three or more public places in Gibson county, one of which should be in the district in which the land lies, and one at the courthouse door in Trenton, Tennessee, or by advertising in some newspaper published in Gibson county," which did not mention the residence of the mortgagor on the mortgagee, did not contain a sufficient description of the real estate conveyed to comply with the statute of frauds. *Dry Goods Co. v. Hill*, 60.

2. *Evidence. Description of mortgaged premises. Parol evidence.*

In such case no particular realty was indicated with sufficient certainty to permit of parol proof to correct or apply the attempted description, as a description of land applicable with equal exactness to any one of a number of tracts cannot be aided by parol evidence. *Ib.*

3. *Bills and notes. Ratification. Mortgaged security.*

Where defendant, who had put some money in the business of her son-in-law, and must have known of his indebtedness, and that he had made an assignment of his stock of goods, after the execution of a forged note for \$1,000 due January 1, 1912, purporting to be signed by her, executed a mortgage on realty "to secure the payment of one promissory note bearing this date and due January 1, 1912, for \$1,000," she thereby acknowledged the validity of the note and ratified its execution in her name. *Ib.*

4. *Requisites. Description of debt.*

A mortgage of realty "to secure the payment of one promissory note bearing this date and due January 1, 1912, for \$1,000," sufficiently described the indebtedness intended to be secured;

NEGLIGENCE.

MORTGAGE—Continued.

as literal exactness in describing the debt is not required, and a description correct so far as it goes and full enough to direct attention to the sources of full information is sufficient. *Ib.*

5. *Assignment.. Transfer of debt.*

The lien of a mortgage or trust deed passes, without special assignment thereof, to the indorsee of a note or transferee of the debt secured by the instrument; the mortgage being transferred as incident to the debt. *Early Co. v. Williams*, 249.

6. *Assignment. Priorities. Effect of failure to record.*

Assignments of mortgage need not be recorded to preserve priority over subsequent incumbrances. *Ib.*

7. *Release. Effect of satisfaction or release.*

Where the holder of a mortgage has been induced by fraud to enter a discharge or release, if he does not take prompt steps to have his mortgage restored, he is estopped to assert its priority as against a subsequent purchaser or mortgagee relying on such cancellation. *Ib.*

8. *Estoppel. Equitable estoppel. Intent.*

To constitute estoppel, the act relied on must have been done with the knowledge or intent that it would be relied on. *Ib.*

9. *Release of assigned mortgage by mortgagee. Estoppel.*

Where notes and a recorded trust deed of land securing them have been pledged as security for debt of payee thereof, his release on the record of the trust deed which recites facts showing the notes were negotiable and not then due does not affect the pledgee's right or priority over later incumbrancers who made no inquiry of the trustee as to ownership of the notes. *Ib.*

NEGLIGENCE.

1. *Contributory negligence. Last clear chance.*

The rule that contributory negligence of the plaintiff will not bar recovery where defendant could have avoided the accident thereafter generally applies, in relation to successive acts of the parties, only to conscious misconduct of the defendant after discovering plaintiff's peril, not to failure to exercise due care to discovering such peril. *Todd v. Railroad*, 92.

2. *Contributory negligence. Last clear chance. Simultaneous acts.*

Where the misconduct or negligence of plaintiff is simultaneous with that of defendant, or the act of plaintiff has not terminated as a casual factor, there can be no recovery under the doctrine of last clear chance. *Ib.*

3. *Contributory negligence. Last clear chance. Dangerous occupation.*

On principles of public policy, one who is engaged in a business hazardous to the public, such as operating a dangerous instrumentality, is required to be constantly on the lookout for others, and is liable for his negligent failure to keep such lookout, even to one who was negligent in subjecting himself to the danger. *Ib.*

NEGLIGENCE.

NEGLIGENCE—Continued.

4. *Railroads. Accidents at crossings. Contributory negligence. Last clear chance. Gross negligence.*

An adult pedestrian in full possession of his faculties who desired to cross a four-track railroad, the last track of which was blocked by stationary cars, and who stopped on the third track and engaged for several minutes in conversation with another, without at any time looking up the track to ascertain if another train was approaching, was guilty of such gross negligence as to preclude his recovery, even though the railroad employees were bound to anticipate that a person might be there and negligently failed to perform their duty to look out, which negligence on their part would render the company liable for injuries to one whose contributory negligence was not gross. *Ib.*

5. *Railroads. Accidents at crossings. Contributory negligence. Distraction of attention.*

Where a pedestrian, desiring to cross a four-track railroad, stopped on the third track to wait until the cars obstructing the fourth track were removed, and was there struck by cars moving along the third track, the fact that he was watching a train approaching from the opposite direction on the second track, does not relieve him from contributory negligence, since distraction of attention excuses failure to exercise the senses only when it renders their use impracticable. *Ib.*

6. *Res ipsa loquitur.*

In general, mere proof that an accident injurious to plaintiff has occurred does not justify a verdict or judgment imposing liability therefor upon the defendant. *Memphis St. Ry. Co. v. Cavell*, 462.

7. *Burden of proof.*

The law imposes on plaintiff suing for injuries caused by negligence the burden of showing by a preponderance of the evidence that the negligence was the cause of his injury, and that defendant was responsible for the negligence. *Ib.*

8. *Pleading and proof.*

Plaintiff suing for injuries caused by negligence is under the burden that his proof in substance shall correspond with the averments of his pleadings. *Ib.*

9. *Carriers. Injuries. Question for jury.*

In an action against a street railway for injuries to a passenger, where, under all the evidence, no reasonable difference of opinion can exist as to the negligent character of the acts of defendant's employees at a railroad crossing under the particular circumstances and at a particular time, the act was negligent in law, and there is no issue for the jury on the question of the negligence. *Ib.*

NOTICE—OFFICERS.

NEGLIGENCE—Continued.

10. *Carriers. Carriage of passengers.*

Where a street railway's conductor in charge of a motor and trailer after walking upon straight railroad tracks gave the signal to the motorman to attempt the crossing, so that, though the motor got over the tracks, the trailer was struck by a train, the street railway was negligent, though the dust and noise of another train, which the motor had stopped to let go by hindered the conductor's seeing and hearing the approaching train. *Ib.*

11. *Carriers. Carriage of passengers.*

The negligence of a railroad in running a freight over a street railway crossing did not excuse such street railway, whose conductor was negligent in not making sure of the approach of the freight before attempting to cross, from liability to an injured passenger, since the passenger's injuries were the proximate result of the conductor's failure to discharge his duty. *Ib.*

See LIABILITY.

NOTICE.

• *Banks and banking. Authority of cashier. Drafts drawn by cashier to himself.*

A cashier has no implied authority to draw drafts in his own favor or in favor of a creditor in payment of individual debts, and the payee of such drafts is put on notice of the facts, is not an innocent holder, and may be compelled to account to the bank for the amount. *Pemiscot County Bank v. Wilson-Ward Co.*, 426.

NUISANCE.

1. *Intoxicating liquors. Offenses. Breach of the peace.*

Engaging in the sale of intoxicating liquors, declared by Act 1913 (2d Ex. Sess.) chapter 21, to be a nuisance, is among that class of nuisances always treated by the court as tending to disturb the peace and good order of the community. *State v. Reichman*, 685.

2. *Sheriffs and constables. Powers and duties. Enforcement of law.*

That Acts 1913 (2d Ex. Sess.) chapter 2, declaring a saloon a nuisance, provides a method for its abatement, merely furnishes a cumulative remedy, and does not abrogate any other remedy or affect a sheriff's duties. *Ib.*

OFFICERS.

See SHERIFFS AND CONSTABLES.

 PARDON—PARTIES.

PARDON.

 1. *Time of granting. "Conviction."*

Accused, found guilty, may be pardoned although appeal is pending, since in the provision of Const. art. 3, sec. 6, empowering the governor to pardon after conviction, "conviction" means verdict of guilty, not judgment or sentence; and the vacating or suspending of the judgment by appeal does not affect the verdict. *State ex. rel. Barnes v. Garrett*, 617.

 2. *Criminal law. Waiver.*

A prisoner, pardoned pending appeal, who unsuccessfully moves to dismiss his appeal, and does not call the attention of the supreme court to his pardon, the case not being tried on its merits, but affirmed for want of bill of exceptions, and who on remand interposes his pardon in the court below, does not waive the pardon. *Ib.*

 3. *Criminal law. Judicial notice.*

Courts do not judicially notice a pardon. *Ib.*

 4. *Waiver.*

Usually, if a prisoner fails to plead his pardon and puts himself on his trial, he waives the advantage of the pardon. *Ib.*

 5. *Effect. Payment of costs.*

A pardon does not release a convict from costs of the prosecution. *Ib.*

PARTIES.

 1. *Bankruptcy. Discharge of contractor. Judgment against owner.*

The owner filed a bill in chancery against the contractor, the guaranty company, and certain sub-contractors and materialmen who had filed liens against the property, and the separate suits of the lien claimants were consolidated therewith, and the owner sought judgment against the contractor and the surety company for the amount of liens established against its property, and a stipulation between the hotel company, the construction company by its trustee in bankruptcy, and the surety company was filed, showing the amount due from the hotel company to the construction company, providing that it should be applied to the discharge of liens for which the hotel company was secondarily liable, without releasing the surety, and the construction company thereafter filed a petition to stay, and later alleged its discharge in bankruptcy as a bar to the lien claims. *Held*, that as all the parties were before the court, the fact that judgment could not be had against the contractor by reason of his adjudication in bankruptcy did not prevent a foreclosure of the liens against the hotel property, and that, as the trustee in bankruptcy came into court, it was not necessary that the lienholders should be compelled to follow the trustee and the bankrupt back into the bankruptcy court to adjust their claims. *Hotel Co. v. Construction Co.*, 305.

 PARTNERSHIP—PLEADING AND PRACTICE.

PARTIES—Continued.

2. *Mechanics' liens. Perfection of lien.*

Where a prior mortgage on the premises upon which complainant sought a mechanic's lien had been discharged save as to a few mortgage bonds, the holders of which could not be discovered, and the amount of such had been deposited for payment, a mechanic's lien against the premises cannot be defeated because the trustees under the mortgage who yet held the legal title were not made parties within ninety days after serving notice as required by law; for in such cases the trustees were practically nominal parties. *Niehaus v. Construction Co.*, 382.

3. *Joinder. Antagonistic interests.*

That a husband and wife have under a will various interests in property, the extent of which in either of them depends upon his survival of the other, does not make them antagonistic so as to make their joinder as plaintiffs improper. *Scruggs v. Mayberry*. 586.

PARTNERSHIP.

See CORPORATIONS.

PASSENGERS.

See CARRIERS.

PERPETUITIES.

See LAND AND LAND TITLES.

PLEADING AND PRACTICE.

1. *Equity. Bill of review. Collateral attack. Innocent purchaser.*

The rights of an innocent purchaser under a decree could not be interfered with, either by a bill of review for error apparent or an original bill in the nature of a bill of review. *Travis v. Sitz*, 516.

2. *Intoxicating liquors. Offense. Issues and proof. Schoolhouse.*

In a prosecution for selling liquor within four miles of a schoolhouse, the existence of a schoolhouse, where school is ordinarily kept, within four miles of defendant's place of business, is a fact which must be averred in the indictment and proven on the trial, notwithstanding Acts 1909, chapter 1, which extended the four-mile law to the whole state. *Elmore v. State*, 347.

3. *Mechanics' Liens. Amendment. Limitations.*

In a suit to establish a mechanic's lien, complainant did not make the trustees under a prior mortgage parties before the expiration of the ninety days from the service of notice of lien. An amended bill in which the trustees were named as defendants was filed. In that bill the complainant prayed that the court determine the interest, if any, held by the trustees, and that, if the mortgage be found a valid prior lien, complainant be permitted

 POSSESSION.

PLEADING AND PRACTICE—Continued.

to subject the equity of defendants to the satisfaction of his claim, Shannon's Code, section 4495, declares that at any time before trial new parties may be added. *Held* that, as no relief was sought against the trustees, the notice required by section 3536, which is a condition precedent to a mechanic securing priority over the mortgage, not having been served, the amendment will be treated as relating back to the original bill, and the trustees cannot defeat the bill on the plea of limitation. *Niehaus v. Construction Co.*, 382.

 4. *Mechanics' liens. Amendment. Limitations.*

In such case the contractor and mortgagor cannot defeat the lien because the trustees of the mortgage, who held the legal title, were not brought in within the ninety-day period; for, while such parties were indispensable, yet, as no relief was sought against them, limitations do not apply any more than where the contractor is not originally made a party. *Ib.*

 5. *Attachment. Amendment of bill. Effect.*

Where one seeking a mechanic's lien failed to make the trustees of a prior mortgage parties, but later brought them in by amendment, such amendment does not, under Shannon's Code, section 5237, declaring that the attachment laws shall be liberally construed, and plaintiff shall be permitted to amend any defect of form, destroy an attachment levied against the contractor and owner under the original bill. *Ib.*

 6. *Negligence. Pleading and proof.*

Plaintiff suing for injuries caused by negligence is under the burden that his proof in substance shall correspond with the averments of his pleadings. *Memphis St. Ry. Co. v. Cavell*, 462.

 7. *Injunction. Dissolution. Dismissal of bill.*

There was no error in dismissing a bill upon a hearing to dissolve a preliminary injunction, where the parties treated the cause as if submitted on bill, answer, and proof. *Lea v. Railroad Co.*, 560.

 POSSESSION.

 1. *Mines and minerals. Title. Adverse possession. By possession of surface.*

Acts of possession required for the surface and those for the minerals are different; the latter requiring some form of mining or activities directly related thereto. *Northcut v. Church*, 541.

 2. *Adverse. Tacking. Privity.*

Where the grantee of an adverse possessor takes possession, he may unite his subsequent possession with his grantor's prior possession to make out adverse possession for the seven-year period. *Ib.*

PRINCIPAL AND AGENT—SURETY.

PRINCIPAL AND AGENT.

1. *Carriers.. Carriage of passengers. Sleeping car employees.*

With respect to passengers, employees in charge of a Pullman car are held agents of the railroad company, and are bound to refrain from injuring passengers as well as to protect them, but such agency does not exist with respect to trespassers. *Railroad v. Marlin*, 435.

2. *Master and servant. Acts of agent. Responsibility for.*

A principal is liable for injuries inflicted on a third person by the acts of his agent within the scope of the agent's authority, though such acts were in violation of instructions. *Ib.*

3. *Carriers. Acts of agent. Responsibility of principal.*

The employees of a Pullman car are deemed agents of the railroad company only with their relations to passengers, such employees having no control over the management of the train. Decedent, who had been stealing a ride on the top of a train, climbed down to the platform of a Pullman car shortly before the train reached the station. The Pullman car conductor compelled decedent to jump from the moving train while it was on a high trestle, and from resulting injuries decedent died. There was nothing to show that decedent was about to annoy Pullman passengers or to even enter the car, and the act of the conductor was a purely personal matter of his own. *Held*, that the railroad company was not responsible for the act of the Pullman car conductor, for such person was not its agent or servant. *Ib.*

PRINCIPAL AND SURETY.

1. *Fidelity bonds. Construction of contract.*

Contracts of fidelity insurance are to be likened to contracts of insurance rather than to contracts of personal suretyship, and are to be construed by the same exact rules of the law of insurance, and the language of the bond, being that selected and employed by the insurer issuing it for a consideration, when ambiguous or doubtful, must be given the strongest interpretation in favor of the person indemnified which it will reasonably bear. *Green v. Fidelity & Guaranty Co.*, 117.

2. *Fidelity bonds. Construction of contract. Embezzlement.*

Under a fidelity bond executed by the president of a banking and trust company as principal and a fidelity company as surety to save the bank harmless from any pecuniary loss sustained by reason of the fraud or dishonesty of the principal amounting to embezzlement or larceny, it is not necessary to a recovery that the insured introduce such proof as would convict the principal of the crime of larceny or embezzlement as defined by the criminal law. *Ib.*

3. *Fidelity bonds. Renewal contract. Construction. Term.*

Under a fidelity bond against pecuniary loss from the fraud or dishonesty of the president of a banking and trust company amount-

PRINCIPAL AND SURETY.

PRINCIPAL AND SURETY—Continued.

ing to embezzlement or larceny, issued in 1908, which provided indemnity during the term, and any subsequent renewal of such term by reason of the specified acts committed during the continuance of such term for any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter, expressed an intention to protect against losses within the period specified in the bond, and provided that on its execution the insurer should not thereafter be liable under any bond previously issued to the insured, and that on the issuance of any subsequent bond all liability should cease, that only one bond should be in force at one time, unless otherwise stipulated, and which was renewed annually upon an additional consideration, "subject to all the covenants and considerations of the original bond," the renewals constituted separate contracts, and the insured could not recover unless the alleged defaults occurred on some specified date or in some specified period covered by one of such contracts, and discovered within the time limited therefor. *Ib.*

4. *Fidelity bonds. Proofs of loss. Liability.*

Under such bond, providing that the insurer at the expiration of three months after satisfactory proof would pay its liability, and that on the discovery of any act which might result in a claim the insured should as soon as possible give notice to the insurer in writing, and should within three months after the discovery of the default furnish the insurer reasonable particulars and proofs of the correctness of the claim, and declaring that the bond should be void if the employer failed to give such notice, but not providing that a failure to make proofs of the correctness of the claim should forfeit the bond, the allegation of a claim duly made showed that the complaint as the commencement of the action was filed after the lapse of such three months' period. *Ib.*

5. *Fidelity bonds. Denial of liability. Time to use. Waiver.*

A denial of its liability on its fidelity bond made when notice of a claim was given waived the provision of the bond tending to render the suit premature, if brought before the expiration of three months after proof of loss. *Ib.*

6. *Bankruptcy. Discharge. Liability of sureties.*

Shannon's Code, section 6264, declares that, on dissolution of an injunction to stay proceedings on the judgment for money, decree shall be entered against the claimant and his surety for such sum as the court may order. Sections 4485-4487 declare that, where an instrument is joint and several, suit may be brought against one or any of the obligors, and that the discharge of one does not effect discharge of the other. Complainant, who sought to enjoin execution on a money judgment, filed an injunction bond and, after the injunction was issued, was adjudicated a bankrupt. Bankruptcy Act July 1, 1898, chapter 541, section 16, 30 Stat. 550 (U. S. Comp. St. 1913, section 9600), declares that the liability of a person who is a

 QUIETING TITLE—RAILROADS.

PRINCIPAL AND SURETY—Continued.

codebtor with, or guarantor or surety for a bankrupt, shall not be altered by the discharge of the bankrupt. *Held*, that the discharge of complainant, principal in the bond, did not, the injunction being dissolved, discharge the liability of the surety. *Martin Furn. Co. v. Massey*, 338.

7. *Bankruptcy. Composition. Liability of sureties.*

As the release effected by composition of a bankrupt is one affected by operation of law and not mutual consent, the fact that a creditor, whose claim had been enjoined before the debtor was adjudicated a bankrupt, joined in favor of the composition, does not discharge the surety on the debtor's injunction bond. *Ib.*

QUIETING TITLE.

Right to remedy. Title of plaintiff.

Where the husband conveyed land to the wife subject to divestiture should she predecease him, and to the limitation that he should control and use the land during his life, they were both proper parties to sue to remove a cloud from the title, the equitable title being in her and the legal in him. *Scruggs v. Mayberry*, 586.

RAILROADS.

1. *Injuries to persons on tracks. Actions. Statute.*

Shannon's Code, section 157, subd. 4, providing that every railroad company shall keep the engineer, fireman or some other person on the locomotive always on the lookout ahead, and when any person appears upon the railroad, the alarm whistle shall be sounded, the brakes put on, and every possible means employed to stop the train and prevent an accident, does not apply where a trespasser, walking along the railroad right of way, was struck by a piece of timber which became loose and projected from a lumber car; for there was nothing to show the trespasser's danger to the engineer, who did not know of projecting timber. *Preslar v. Railroad*, 42.

2. *Injuries to persons on tracks. Trespasser.*

Where the servants in charge of a train did not know that a piece of timber was projecting from a lumber car, they do not owe a trespasser on the right of way any duty to exercise care to prevent him from being struck by the projecting timber. *Ib.*

3. *Injuries to person on tracks. Actions. Res ipsa loquitur.*

Where a trespasser on a railroad right of way was struck by a piece of timber which projected from a lumber car and it did not appear how the lumber was loaded or whether the timber was caused to project by reason of negligence of the railroad company and there was no showing as to how long it had projected, negligence on the part of the railroad company cannot be based on the doctrine of *res ipsa loquitur*. *Ib.*

RAILROADS.

RAILROADS—Continued.

4. *Accidents at crossings. Proximate cause. Obstruction of crossing.*

The obstruction of a highway crossing by cars stopped across it is not the proximate cause of injury to a person who was struck by moving cars on another track while he was waiting to cross. *Todd v. Railroad*, 92.

5. *Accidents. Statute. Switching.*

The statutes prescribing the precautions to be observed in the operation of trains do not apply to movements of cars during switching operations in railroad yards. *Ib.*

6. *Accidents at crossings. Care of traveler. Continuing duty.*

The duty of a pedestrian approaching a railroad grade crossing to look and listen continues so long as he is on the track. *Ib.*

7. *Accidents at crossings. Care of traveler. Sight and hearing.*

Where either the sense of sight or of hearing is not available on approaching a railroad crossing, the obligation of a pedestrian to use the other sense is stronger. *Ib.*

8. *Accidents at crossings. Contributory negligence. Last clear chance. Gross negligence.*

An adult pedestrian in full possession of his faculties who desired to cross a four-track railroad, the last track of which was blocked by stationary cars, and who stopped on the third track and engaged for several minutes in conversation with another without at any time looking up the track to ascertain if another train was approaching, was guilty of such gross negligence as to preclude his recovery, even though the railroad employees were bound to anticipate that a person might be there and negligently failed to perform their duty to look out, which negligence on their part would render the company liable for injuries to one whose contributory negligence was not gross. *Ib.*

9. *Accidents at crossings. Contributory negligence. Distraction of attention.*

Where a pedestrian, desiring to cross a four-track railroad, stopped on the third track to wait until the cars obstructing the fourth track were removed, and was there struck by cars moving along the third track, the fact that he was watching a train approaching from the opposite direction on the second track does not relieve him from contributory negligence, since distraction of attention excuses failure to exercise the senses only when it renders their use impracticable. *Ib.*

10. *Right of way. Easement.*

Deeds to a railroad right of way construed, and held to convey only an easement, the fee remaining in the grantor. *Railroad Co. v. Telephone Co.*, 198.

11. *Telegraphs and telephones. Railroad right of way. Right of telephone lines to cross.*

A railroad company, having only an easement in its right of way, does not own to the sky, and cannot enjoin the crossing of

RAPE.

RAILROADS—Continued.

overhead telephone wires so long as they do not impair the reasonable and safe use of the easement. *Ib.*

12. *Costs. Change in subject matter pending suit.*

During the pendency of an action to enjoin telephone companies from constructing lines across a railroad right of way, defendants erected new poles and strung wires thereon properly, the previous construction being defective. *Held* that costs in lower court should be paid by defendants, while costs of appeal should be paid by appellant railroad company. *Ib.*

13. *Cónveyances. Construction. Conditions subsequent. Right of way.*

A contract to which deed for a right of way referred, whereby a land company granted an interurban railroad a right of way "on the following conditions," that it would grade the way, etc., with a forfeiture providing for a breach of condition, which necessarily implied the right of reentry, created conditions subsequent rather than covenants running with the land, so that a purchaser in insolvency proceedings and its successors were not affected thereby. *Land Co. v. Interurban Co.*, 353.

14. *Eminent domain. Extent of power. Statutory construction.*

Under Acts 1907, ch. 254, authorizing a railroad to condemn a pipe line between a running stream and its reservoir or tanks, a pipe line may be condemned between a reservoir formed by damming a running stream and the railroad's tanks. *Lea v. Railroad Co.*

15. *Eminent domain. Proceedings to take. Offenses. Threatened misuser.*

Where a railroad company has been granted eminent domain power for pipe line purposes, an owner cannot defeat condemnation proceedings upon the ground that the railroad intends to divert some of the water to purposes not contemplated by the statute. *Ib.*

16. *Eminent domain. Rights acquired. Misuser. Who may question.*

Where a railroad has power to condemn for pipe line purposes, only the State may question its diversion of the water to purposes not contemplated by the statute. *Ib.*

See TELEGRAPH AND TELEPHONES.

RAPE.

1. *Evidence. Corroboration of female.*

In Pub. Acts 1911, chapter 36, providing punishment for criminal abuse of females, the proviso that no conviction shall be had on the unsupported testimony of the female is complied with if there is adduced sufficient evidence of another than the female which fairly tends to convict the defendant of the crime. *Bledsoe v. The State*, 143.

 RECEIVERS—SETTLEMENT.

RAPE—Continued.

2. *Evidence. Corroboration of female.*

Such evidence need not be direct and positive, in the sense of being sufficient to convict, independent of that of the female alleged to have been debauched, but simply as to such facts or circumstances as tend to support the female in her testimony upon fact or facts essential to constitute the offense. *Id.*

RECEIVERS.

1. *Jurisdiction. Action by receiver. Foreign States.*

The rule is general that a mere chancery receiver cannot sue in a foreign State, and can assert claims only through exercise of comity by the State in which he seeks to exercise his functions, and the rule necessarily attributes the duties of a receiver to an officer of a foreign State claiming authority under its legislative act, since foreign laws can have no extraterritorial efficacy, save in those instances which are governed by the "full faith and credit" clause of the federal Constitution. *Van Tuyl v. Carpenter*, 629.

2. *Insolvency receivers. Jurisdiction of actions.*

If the receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State. *Id.*

RES IPSA LOQUITUR.

See NEGLIGENCE; ACTIONS, RIGHT AND CAUSE.

SALES.

1. *Conditional sales. Recovery of property. Failure to resell. Effect.*

Where the seller of goods on conditional sale retook the goods, title to which was retained in him after they were removed from the State, his failure to resell them, as required by the conditional sales law, canceled the debt against the original purchaser. *Pappas v. State*, 499.

2. *Conditional sales. Criminal responsibility for transfers. Statutes. Construction. "Knowingly or willfully."*

Laws 1909, ch. 557, sec. 1, making it unlawful to remove from the State any personality, title to which was retained at time of sale, unless written consent of the seller is obtained, having omitted the words "knowingly" or "willfully," does not require intent to defraud as an element of the offense, but the bare removal, even if in good faith, constitutes the offense. *Id.*

SETTLEMENT.

Compromise. Validity.

The law encourages honest efforts to compromise differences. *Silliman v. Life Ins. Co.*, 646.

SHERIFFS AND CONSTABLES.

SHERIFFS AND CONSTABLES.

1. *Powers and duties.*

The office of sheriff carries all the common-law powers and duties except as modified by statute. *State ex rel. v. Reichman*, 653.

2. *Powers and duties. "Notice."*

Under Shannon's Code, section 6899, a sheriff who has "notice" of an offense and does not do his duty to prevent it is guilty of a misdemeanor, and any knowledge from any source is notice within the statute. *Ib.*

3. *Powers and duties. Notice.*

Since cities have police officials, the sheriff may assume that they will perform their duties, but if he has knowledge of neglect on their part, or reason to think there is neglect, he must inform himself and prevent and suppress offenses in cities as well as rural districts. *Ib.*

4. *Arrest. Arrest without warrant. "Breach of the peace." Unlawful sale of liquors.*

"Breach of the peace" being a generic term including all violations of public peace or order, includes unlawful sale, actual or threatened, of intoxicating liquors, and the sheriff may arrest without warrant therefor. *Ib.*

5. *Duties. Compensation.*

The requirement that the sheriff, to prevent breaches of the peace, arrest one who threatens unlawful sale of intoxicating liquors and if necessary close his place of business, is not subject to the objection of requiring services without compensation. *Ib.*

6. *Duties of sheriff. Investigations.*

The duty of the sheriff, having notice of commission of an offense being to prevent or suppress it, involves the duty to at least make some investigation, and it is not necessary in case of unlawful sales of intoxicating liquors, for the sheriff to actually see sales before swearing out warrants. *Ib.*

7. *Duties of sheriff. Investigations.*

Although the sheriff is not bound to maintain a detective force, and no statute in terms make it his duty to swear out warrants or give information to the grand jury, yet being commanded to prevent and suppress crimes and breaches of the peace, he must use all the means provided by law to accomplish such end. *Ib.*

8. *Powers and duties. Breach. Evidence.*

Evidence held to show that a sheriff failed to perform his duties to prevent and suppress breaches of the peace by unlawful sale and threatened unlawful sale of intoxicating liquors. *Ib.*

9. *Breach of duties. Defenses.*

It is no defense for the sheriff's failure to prevent breaches of the peace by unlawful sales of intoxicating liquors, that the State was proceeding against offenders under the Nuisance Act (Laws

 STATUTE OF FRAUDS.

SHERIFFS AND CONSTABLES—Continued.

1913 [2d Ex. Sess.] chapter 2), or that the criminal court administration was lax and nothing would have been accomplished in case of arrest. *Ib.*

10. *Title to office. Ground for removal.*

A sheriff who has made an honest and reasonably intelligent effort to do his duty will not be removed by the courts, though his efforts may not have been wholly successful, his right to continue in office depending rather on the good faith of his efforts than on the degree of his success. *State v. Reichman*, 685.

11. *Powers and duties. Notice of violation of law.*

When a sheriff learns that a city in his county is collecting tribute from numerous liquor dealers and leaving them otherwise undisturbed, this is notice to him that the law is being violated and no effort made to enforce it. *Ib.*

12. *Arrest. Without warrant. Duties of sheriff.*

While a sheriff need not make a forcible entrance into a suspected residence or place of business to discover violations of the liquor law, he or his deputies should enter open saloons and make arrests if justified by what they see therein. *Ib.*

13. *Powers and duties. Enforcement of law.*

That Acts 1913 (2d Ex. Sess.) chapter 2, declaring a saloon a nuisance, provides a method for its abatement, merely furnishes a cumulative remedy, and does not abrogate any other remedy or affect a sheriff's duties. *Ib.*

14. *Powers and duties. Arrest.*

On making an arrest for a threatened violation of the liquor law; the sheriff should take such steps as are necessary to prevent the threatened sales, as, in case of a saloon open for business, by closing it till the liquors are removed, and then release the offender and leave future sales and future threats to be dealt with as they arise. *Ib.*

15. *Powers and duties. Willful neglect.*

In proceedings to remove a sheriff for failure to enforce the liquor law, he is precluded, by his admission that he did nothing in a city within his county but to serve process where liquor was openly sold in violation of law, from asserting that no willful neglect of his duty has been shown. *Ib.*

See BREACH OF THE PEACE.

STATUTE OF FRAUDS.

Real property. Mortgage. Description.

A mortgage retiting the mortgagor's conveyance of "the following real estate," one house and lot and storehouse, bounded on the east by east alley, south by Third street, west by Broad street, north by Fourth street, containing the entire block between

STATUTES AND STATUTORY CONSTRUCTION.

STATUTE OF FRAUDS—Continued.

Third and Fourth streets, known in the plan of town as lots 53, 54, 55, and 56, and on default authorizing the mortgagee to sell the real estate at "Eaton, in Gibson county, Tennessee, at public sale," first advertising the sale by posters in three or more public places in Gibson county, one of which should be in the district in which the land lies, and one at the courthouse door in Trenton, Tennessee, or by advertising in some newspaper published in Gibson county, which did not mention the residence of the mortgagor or by the mortgagee, did not contain a sufficient description of the real estate conveyed to comply with the statute of frauds. *Dry Goods Co. v. Hill*, 60.

STATUTES AND STATUTORY CONSTRUCTION.

1. *Title of act.*

Priv. Acts 1915, chapter 186, entitled "An act to establish a levee and drainage district . . . and for the purpose of draining and the reclamation of the wet and swamp lands, . . . and prescribe the method of doing so, and providing for the assessment and collection of the cost and expense of such improvement, and the manner of obtaining the means and funds therefor," is violative of Constitution article 2, section 17, providing that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title, in that section 4 of the act provides that a court composed of the chairman or judges of the county courts of the counties within the district shall sit once each month for the purpose of hearing and determining such questions as may be necessary to be passed upon under the act; it creating a new and independent court. *Mengel Box Co. v. Fowlkes*, 202.

2. *Validity. Subjects and titles of acts.*

Acts 1915, chapter 161, entitled "An act to permit the husband or wife to testify," and providing that they shall be competent to testify for or against each other in criminal cases, is not invalid, under Constitution article 2, section 17, providing that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title; the means employed in the act being the only way of accomplishing the object stated in the title, regardless of whether the words may compel the spouse to testify, that being an incidental result. *McCormick v. State*, 218.

3. *Intoxicating liquors. Evidence. Internal revenue license.*

Acts 1903, chapter 355, making the payment of an internal revenue special tax as a retail liquor dealer *prima facie* evidence of sales within the law prohibiting sales of liquor within four miles of a schoolhouse, and Acts 1909, chapter 384, providing that in all prosecutions for violations of the law against the sale of intoxicating liquors copies of the records in the office of the internal revenue collector, showing defendant's payment of an internal revenue special tax as a liquor dealer, or the issuance of an internal revenue special tax stamp, when certified by the

STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

revenue collector, shall be competent evidence, are drastic and in derogation of the common-law rights of the citizen, and must not be too liberally construed against the citizen. *Elmore v. State*, 347.

4. *Liens. Statutory. Priorities.*

A lien created by statute does not take precedence of a prior contractual lien, unless such is the clear intention of the statute even when the statutory lien is for work done on or to the betterment of the property in question. *Parker-Harris Co. v. Tate*, 509.

5. *Liens. Statutory.*

A statutory lien has only such force as the statute gives it, and the superseding or subordinating of an earlier lien, by the statute creating a lien, should not easily be inferred, especially where the statutory lien is not awarded for service adding value to or preserving the property in question. *Ib.*

6. *Liens. "Owner."*

Where the same word used in a statute more than once and the meaning is clear at one place, it will ordinarily be construed to have that meaning elsewhere in the act, and the word "owner," as used in Laws 1905, ch. 173, refers to the conditional vendee who has control and use of the automobile, and not to the conditional vendor. *Ib.*

7. *Acts in pari materia.*

Priv. Laws 1915, ch. 78, as to criminal court of Dyer county, must be construed *in pari materia* with chapter 82, passed on the same day, creating the office of county judge in such county. *Hodge v. State*, 525.

8. *Judges. Certainty. Intent of legislature.*

Priv. Laws 1915, ch. 78, sec. 12, providing that the "judge of the court" of Dyer county shall be judge of the criminal court, and receive no other compensation than provided by law for said county judge, clearly shows that the county court was intended, and is not objectionable for omission of "county" before the words "court of Dyer county." *Ib.*

9. *Corporations. Right of stockholders. Representation. Powers.*

The power of representation by a corporation of its stockholders which may, by mere failure to exercise it, estop the stockholders to deny liability for an arbitrary assessment of the full value of their stock, ought to be conferred in unmistakable terms of the statute itself, and will not be conferred by construction. *Van Tuyl v. Carpenter*, 629.

10. *Courts. Decisions controlling. Matters not contested.*

While a decision that assessments by the comptroller of the currency are conclusive necessarily implies that they are valid, yet when that power is merely assumed without examination, the

TAXATION.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

point cannot be successfully used by analogy in determining the validity of a statute authorizing assessments by the banking commissioner, where the question is directly raised. *Van Tuyl v. Carpenter*, 629.

11. *Insurance. Life policies. Not in good faith.*

In acts 1901, chapter 141, section 1, as to penalties for refusing to pay a policy, the words "not in good faith," are antithetical to "in good faith," and imply a lack of good or moral intent as the motive for refusal to pay the loss. *Silliman v. Life Ins. Co.*, 646.

12. *Insurance. Life policies. Refusal to pay loss. Right to statutory penalty.*

Under such statute, the right to recover the penalty is conditional, and does not exist where the right to recover the face of the policy has been forfeited by failure to pay premiums, or where the refusal is in good faith. *Ib.*

TAXATION.

1. *Commerce. "Interstate commerce." Engagement in by liquor dealer. Statute.*

Under Acts 1909, chapter 479, section 4, subjecting the occupation of wholesale liquor dealer to a privilege tax, making it a misdemeanor to exercise the privilege without first paying the tax, and section 16, providing that the inhibition of the act shall not apply to any persons engaged in interstate commerce a liquor dealer, who sold to customers out of the State, securing his supply from other dealers in the city, who carried a "borrow and loan" account with such other dealers and in turn supplied them with liquors, thus balancing accounts, but making settlement by cash payment in one case, was doing an intrastate business, and so liable for the tax. *Hiller v. Crenshaw*, 156.

2. *Taxation. Special statutes. Constitutionality.*

Chapter 667, Priv. Acts 1915, incorporating a school district, levying a school tax on such district, and providing for its collection by the county trustee, is not in contravention of constitution article 2, section 29, forbidding the delegation of the power of taxation except to counties or incorporated towns. *Quinn v. Hester*, 373.

3. *Special statutes. Constitutionality.*

Nor is it in contravention of constitution article 2, section 28, requiring equality and uniformity of taxation, since such constitutional provision does not prevent local taxation for local purposes. *Ib.*

4. *Legislative power to levy local taxes.*

In the absence of constitutional restriction, the legislature has plenary power to levy taxes for local purposes. *Ib.*

 TELEGRAPHS AND TELEPHONES— TRESPASSERS.

TELEGRAPHS AND TELEPHONES.

Railroad right of way. Right of telephone lines to cross.

A railroad company, having only an easement in its right of way, does not own to the sky, and cannot enjoin the crossing of overhead telephone wires so long as they do not impair the reasonable and safe use of the easement. *Railroad v. Telephone Co.* 198.

THEATERS AND SHOWS.

 1. *Right to admission.*

The right of a purchaser of a ticket to enter and remain at a theater, circus, race track, or private park is a mere revocable license. *Boswell v. Barnum & Bailey*, 35.

 2. *Right to admission.*

No action will lie, in the absence of statute regulating admission to places of amusement, for the refusal to admit any person. *Ib.*

 2. *Right to admission.*

If the license of a ticket holder to enter a place of amusement be revoked, and the ticket holder ejected without necessary force, his only remedy is an action for breach of the contract, in which damages are limited to the ticket price and expenses incident to the purchase of, the ticket and attending the place of amusement. *Ib.*

 4. *Conduct of parties.*

The patrons of places of amusement are required by law to demean themselves in an orderly and civil manner. *Ib.*

 5. *Liability for uncivil conduct towards patrons.*

The proprietor of a place of amusement is required to exercise civil conduct toward those he permits to enter and remain on his premises, and is liable in tort for breach of this duty. *Ib.*

 6. *Injuries to persons attending. Acts of employees.*

Circus ushers, in acting uncivilly towards patrons in assigning seats, though acting in excess of their authority, held to be acting within the general scope of their authority. *Ib.*

TORTS.

See CONTRACTS.

TRESPASSER.

 1. *Railroads. Injuries to persons on tracks.*

Where the servants in charge of a train did not know that a piece of timber was projecting from a lumber car, they do not owe a trespasser on the right of way and duty to exercise care to prevent him from being struck by the projecting timber. *Preslar v. Railroad*, 42.

TRIAL—UNITED STATES.

TRESPASSER—Continued.

2. *Carriers. Carriage of passengers. Duty of care.*

A carrier of passengers is bound to exercise the highest degree of care for their safety, but its only duty to a trespasser is to refrain from wilfully injuring him. *Railroad v. Marlin*, 435.

TRIAL.

1. *Criminal law. Objections. Repetition.*

It is not necessary to repeat an objection to a question put to a witness, one ruling on one question being enough, nor is repetition of similar exceptions required. *McCormick v. State*, 218.

2. *Witnesses. Privilege. Waiver.*

Where the objectionable portions of testimony of defendant's wife were not brought out on cross-examination, he did not by the cross-examination waive his right to object and except to such testimony, especially where he moved to strike all her testimony. *Ib.*

3. *Criminal law. Conduct of counsel.*

Counsel should not argue from the evidence excluded by the court, or upon other cases, where there is nothing in the record to sustain the reference. *Ib.*

TRUSTS.

1. *Removal of trustee. Friction with beneficiary.*

Where testator's will directed his widow as trustee to apply the income from a daughter's share of the estate to the best interest of the latter and for her comfort, maintenance, and support, and friction developed between mother and daughter resulting in litigation and bad feeling, the mother will be removed as trustee on the daughter's application, irrespective of the merits of the dispute. *Maydwell v. Maydwell*, 1.

2. *Removal of trustee. Statute.*

The chancery court has jurisdiction, under Shannon's Code, sections 5414, 5422, to remove a trustee for the causes enumerated in the statute and "for other good cause" at suit of the beneficiary. *Ib.*

3. *Removal of trustee. Equitable jurisdiction.*

A court of equity has inherent jurisdiction to remove a trustee, independent of statutory provisions, for good cause shown. *Ib.*

4. *Husband and wife. Wife's separate estate. Necessity of trustee.*

A trustee is not essential to the creation of a separate estate. *Travis v. Sitz*, 156.

UNITED STATES.

Claims against United States. "Gift. "Bounty."

An amount appropriated under Act March 4, 1915, to repay the city of Memphis for the rental value of land taken for a navy yard

 U. S. STATUTES CITED AND CONSTRUED—WILLS.

UNITED STATES—Continued.

during the Civil War is not a gift or bounty, but is in the nature of a debt supported by good and valuable consideration. *Moyers v. Memphis*, 263.

UNITED STATES STATUTES CITED AND CONSTRUED.

Sections 8565-8599. Commerce. Interstate commerce. Validity of contract. Complaint. *Roberts v. Railroad*, 48.

Section 9651. Bankruptcy. Mechanics' liens. Discharge in bankruptcy. Statute. *Hotel Co. v. Construction Co.*, 305.

VENDOR AND VENDEE.

Liens. Conditional sales. Lien for automobile injury. Priorities. "Deodand."

The lien on an automobile, given by Laws 1905, ch. 173, sec. 5, to a person injured thereby in collision, is inferior to a conditional vendor's rights therein fixed before the collision, and only the interest of the vendee is subject to such lien; and the doctrine of "deodand" (by which is meant the forfeiture of a personal chattel animate or inanimate, becoming the immediate instrument causing death) does not apply, especially in view of Const. art. 1, sec. 12, providing that "if any person be killed by casualty, there shall be no forfeiture in consequence thereof;" and since the legislative policy has been consistently to protect the lien for the price. *Parker-Harris Co. v. Tate*, 509.

WILLS.

1. *Trusts. Removal of Trustee. Friction with beneficiary.*

Where testator's will directed his widow as trustee to apply the income from a daughter's share of the estate to the best interest of the latter and for her comfort, maintenance, and support, and friction developed between mother and daughter resulting in litigation and bad feeling, the mother will be removed as trustee on the daughter's application, irrespective of the merits of the dispute. *Maydwell v. Maydwell*, 1.

2. *Construction. Estates created.*

A will devising land to the son without mention of heirs or children or character of estate is a direct devise in fee. *Scruggs v. Mayberry*, 586.

3. *Construction. Estates created.*

A will devising lands to the wife during her life and on her death to the son and the heirs of his body, but if he should die without heirs, to his sister, and the heirs of her body, is a direct devise in fee to the son, since at common law such a devise would be an estate tail, and under Shanon's Code, sec. 3673, all such estates are made estates in fee simple. *Ib.*

4. *Construction. Estates created. Limitations.*

Where a devise of a fee simple is followed by condition that if the devisee should die without heirs the land should go to his sister,

WILLS.

WILLS—Continued.

it is not impaired by such limitation where the devisee survives the testator, since, to invoke the limitation, the devisee must die before the testator's death. *Ib.*

5. *Construction. Estates created.*

Where a devise of the fee is followed by a devise over in case the devisee dies without issue or without children, or without heirs of the body, to invoke the limitation, the death of the devisee must occur prior to that of the testator. *Ib.*

6. *Construction. Conflict in rules.*

The rule (Shannon's Code, sec. 3675) that where a devise of the fee is followed by devise over if the devisee dies without issue, to invoke the limitation the devisee's death must occur prior to that of the testator, and the rule that if a life estate is granted with unlimited power of disposition of the whole estate and remainder created in the same property, the latter is void, are not in conflict. *Ib.*

7. *Construction. Estates created. Power of disposition.*

Powers merely incidental and to be inferred from the fact of ownership are not the unlimited or absolute power of disposition which, if given to a life tenant, makes a subsequent remainder void, but such absolute power must be given in express terms or impliedly by added words. *Ib.*

8. *Estates created. Particular words.*

The rule that where a devise of the fee is followed by a devise over if the devisee dies without issue, to invoke the second devise the devisee must predecease the testator, applies even where at the time of making the will the devisee was only eight years old, and the testator died within one year thereafter. *Ib.*

9. *Estates created. Devisees over.*

Where the devise is to a son and to his children, although they are not yet in being and may never be, it is the preferred construction that the son takes the life estate with remainder to the children. *Ib.*

10. *Estates created. Remainders.*

The devise to a son and to his children, and if he dies without children then to his sister and her children, creates a life estate in the son with remainder to the children, and at birth of a child the remainder would vest, subject to open and let in after-born children. *Id.*

11. *Construction. Technical words. "Heirs of the body."*

When technical words are used in a will they are presumed to be used in a technical sense, and before another meaning can be attached to them that meaning must clearly appear, so that unless it clearly appears that the testator used the words "heirs of the body" meaning children, they will not be so construed. *Ib.*

WITNESSES.

WILLS—Continued.

12. *Construction. Technical words. Rules of property.*

Since Shannon's Code, sec. 3673, making all estates tail fee-simple estates, creates a rule of property, its application ought not to be rendered difficult by a latitudinarian construction of familiar words, the technical significance of which uniformly creates an estate tail at common law. *Ib.*

13. *Construction. Particular words.*

Provisions of will *Held* not to indicate that the words "heirs of the body" were intended to be used in other than the technical significance. *Ib.*

WITNESSES.

1. *Competency. Husband and wife. Objections. Time.*

The defendant in a criminal case should object to the offer of his wife as a witness against him when she is first offered. *McCormick v. State*, 218.

2. *Privilege. Husband and wife.*

Acts 1915, chapter 161, making the husband and wife competent witnesses for or against each other in criminal cases, does not destroy the rule that communication between them by virtue or in consequence of the marital relation, or any confidential communications between them, are inadmissible. *Ib.*

3. *Confidential relations. Husband and wife. Time for objections.*

An objection by one accused of crime to a question asked his wife as witness, before the answer, because calling for confidential matter arising out of the marital relation, was properly and seasonably made. *Ib.*

4. *Privilege. Waiver.*

Where the objectionable portions of testimony of defendant's wife were not brought out on cross-examination, he did not by the cross-examination waive his right to object and except to such testimony, especially where he moved to strike all her testimony. *Ib.*

5. *Privileged writings.*

The general rule is that letters between spouses are privileged, falling within the privilege for confidential communications which prevails between husband and wife. *Ib.*

Ex. 11/1/15.

15-1-17

